(27,128)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 377.

PORT OF SEATTLE, APPELLANT,

vs.

OREGON & WASHINGTON RAILROAD COMPANY AND J. F. DUTHIE & COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

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1 *Names and Addresses of Counsel.*

Messrs. Preston, Thorgrimson & Turner, Counselors for Appellant, 911 Lowman Building, Seattle, Washington.

Messrs. Bogle, Merritt & Bogle, Counselors for Appellee, Oregon & Washington Railroad Company, 609 Central Building, Seattle, Washington.

Messrs. Aust & Terhune, Counselors for Appellee, J. F. Duthie & Company, a corporation, 404 Boston Block, Seattle, Washington.

2 In the Superior Court of the State of Washington for King County.

No. 120,010.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Complaint.

Comes now the plaintiff and for cause of action against the defendants alleges:

I.

That the plaintiff is a municipal corporation organized and existing under and by virtue of Chapter 92 of the Laws of 1911, as amended by Chapter 62 of the Laws of 1913, of the State of Washington.

II.

That the defendant Oregon & Washington Railroad Company is a corporation organized under and by virtue of the laws of the State of Oregon, authorized to do, and doing business as a corporation in the State of Washington. That the defendant J. F. Duthie & Company is a corporation organized under the laws of the State of Washington.

III.

That on or about the 22d day of August, 1916, the defendant Oregon & Washington Railroad Company made, executed and delivered a certain indenture of lease to the defendant J. F. Duthie & Company, a copy of which lease is hereto attached, marked Exhibit "A", and by reference made a part hereof.

3

IV.

That the defendant Oregon & Washington Railroad Company is the owner of that piece or parcel of land being a portion of Block 393, Seattle Tidelands, specifically described in Paragraph I of said lease marked Exhibit "A", attached hereto. That said parcel of land abuts upon what is known as the East Waterway, in the City of Seattle, Washington. That the State of Washington and the United States Government have established in said East Waterway, a distance of one hundred twenty five feet (125 ft.) from the shoreline of the premises herein described, a pierhead line, and the waterway area between the said shoreline and the said pierhead line, as the same abuts upon the premises herein described, is within the jurisdiction of the plaintiff acting for and on behalf of the State of Washington. That in the said lease hereto attached and marked Exhibit "A", the said defendant Oregon & Washington Railroad Company purports to claim and does claim jurisdiction over said waterway area. That the said defendant Oregon & Washington Railroad Company has no right, title or interest in said waterway area, and has made no application to the plaintiff for a permit for the use of said waterway area, and the plaintiff has granted no permit for the use of said waterway area, as provided by law or at all, and any claim of title or interest in said waterway area by the Oregon & Washington Railroad Company, or by the defendant J. F. Duthie & Company claiming under the defendant Oregon & Washington Railroad Company, is wholly unfounded.

V.

That on or about the 23d day of November, 1916, the plaintiff, upon application being duly made, granted to the defendant J. F. Duthie & Company a permit for the use of the waterway area abutting upon the property described in the lease referred herein
4 a copy of which permit is hereto attached, marked Exhibit "B", and by reference made a part hereof.

VI.

That plaintiff is informed and believes said information to be true that the rental which the defendant Oregon & Washington Railroad Company fixed in the lease with the defendant J. F. Duthie & Company, a copy of which lease is hereto attached, marked Exhibit "A", was based not only upon the rental value of the tideland lot but also upon the rental value of the harbor area abutting thereon, and plaintiff alleges that by reason thereof the defendant Oregon & Washington Railroad Company is collecting, and will continue to collect rental for said waterway area from the defendant J. F. Duthie & Company.

Wherefore, Plaintiff prays that the defendant Oregon & Washington Railroad Company be permanently enjoined from claiming or exercising any jurisdiction over the waterway area abutting on the said property, and that the court enter a decree directing the said

Oregon & Washington Railroad Company and the said J. F. Duthie & Company to reform said lease by striking therefrom all the passages therein in which the said Oregon & Washington Railroad Company claims jurisdiction over the said waterway area, and attempts to grant to the said defendant J. F. Duthie & Company any right, title or interest therein. That the court ascertain the amount of rental, if any, which the defendant J. F. Duthie & Company has paid or is to pay under the said lease for the Waterway area abutting upon the tideland lot, and that in the event the said J. F. Duthie & Company is paying any rental for said waterway area or has paid any rental for said waterway area, or will pay any rental therefor, that any such sums heretofore paid be remitted to the said Oregon &
5 Washington Railroad Company and that the said Oregon & Washington Railroad Company be enjoined from collecting any further rent for the use of said waterway area; and that the title of the plaintiff, for and on behalf of the State of Washington, in and to said waterway area, be quieted as against the Oregon & Washington Railroad Company and against the defendant J. F. Duthie & Company, save and except as said J. F. Duthie & Company has a right to claim an interest in said waterway area by virtue of the permit granted it by the plaintiff; and that it be decreed that the said Oregon & Washington Railroad Company, as the owner of said tideland lot abutting upon said waterway area, has no right, title or interest in said waterway area, or any part thereof, or any jurisdiction thereover; and for such other and further equitable relief as the court may deem meet and right in the premises.

C. J. FRANCE,
Attorney for Plaintiff.

STATE OF WASHINGTON,
County of King, ss:

Robert Bridges, being first duly sworn, on oath deposes and says: That he is president of the Port Commission of the Port of Seattle, plaintiff in the above entitled action. That he has read the foregoing complaint, knows the contents thereof, and believes the same to be true. That he makes this verification for and on behalf of said plaintiff, being authorized so to do.

ROBERT BRIDGES.

Subscribed and sworn to before me this 22d day of December, 1916.

C. J. FRANCE,
Notary Public in and for the State of Washington, Residing at Seattle.

6 EXHIBIT "A."

This agreement, entered into in duplicate this 22d day of August, 1916, between Oregon and Washington Railroad Company, a corporation organized under and by virtue of the laws of the State of

Oregon, hereinafter called the "Lessor", and J. F. Duthie & Company, a corporation organized under the laws of the state of Washington, hereinafter called the "Lessee"; Witnesseth

I.

That in consideration of the mutual undertakings, covenants and agreements hereinafter contained, and payments to be made by the Lessee to the Lessor, as herein provided, the Lessor does hereby lease and let unto the Lessee the following described parcel of land situated in the City of Seattle, King County, Washington, containing 11.89 acres more or less, and being a part of block 393, Seattle Tide Lands, located upon Harbor Island, according to the plat thereof of record in the office of the County Auditor of said County, said parcel being particularly described as follows, to wit:

A piece or parcel of land, being all that portion of Block 393, Seattle Tide Lands, situated in Seattle, King County, Washington, described as follows:

Beginning at the northwest corner of said Block 393, thence north 45 deg. east one hundred forty-one and forty-two hundredths (141.42) feet; thence due east four hundred and seventy (470) feet to a point in the east line of said Block 393; thence due south following said east line, seven hundred sixty-three and twenty-eight hundredths (763.28) feet, to a reentrant corner of said Block 393; thence due east thirty-five and nineteen hundredths (35.19) feet to the most easterly corner of said line of said Block 393; thence south 14 deg. 30′ west, following the easterly line of said Block 393; one hundred fifty-four and ninety-four hundredths (154.94) feet; thence due west five hundred sixty-six and forty hundredths (566.40) feet to a point in the west line of said Block 393; thence due north following said west line eight hundred thirteen and twenty-eight hundredths (813.28) feet to place of beginning.

II.

The term of this lease is for the period of three (3) years next ensuing from the date of this agreement, and commencing with said date Lessee is to pay the Lessor a rental of Fifteen thousand five hundred thirty-eight and 20/100 ($15,538.20) dollars, per annum, payable in twelve (12) equal monthly installments in advance during the term of this lease, or any extension thereof, and in addition to said stipulated rental, the Lessee promises and agrees to pay to the Lessor before the same become delinquent any and all taxes assessed or levied against said land and improvements placed upon or in connection with the same (including taxes if any are levied or assessed upon the area between the west margin of the waterway on the front of said premises and pierhead line parallel therewith and improvements and property built or placed upon or within said area; and Lessor is privileged to pay said taxes if it elects to do so, and in such event Lessee shall repay to the Lessor the amount thereof within five (5) days from the date of receiving a statement of the

amount thereof from Lessor). Lessee covenants with the Lessor that it will pay said rentals at said times, and will also pay said taxes as they are levied and assessed against said premises and improvements thereon, and before same become delinquent during the term of this lease and any extension thereof.

III.

The Lessee contemplates the construction and development upon said leased premises and the area between same and the pierhead line in front thereof of a ship building and manufacturing plant and it is stipulated that in event Lessee constructs and pays for
8 any buildings, structures or improvements upon said premises during the period of this lease, that it shall be privileged to remove the same at its own expense within ninety (90) days from the expiration or sooner termination of this lease. (This applies to all structures and improvements placed thereon by Lessee to pierhead line except piling in place; but Lessor is hereby granted a lien upon said buildings, structures and improvements, and each and all of them for rent and taxes that may have accrued to the Lessor against the Lessee under this lease, and none of said buildings, structures or improvements shall be removed until said obligations have been paid, nor at all after the expiration of said ninety (90) day period. It being agreed between the parties hereto that unless removed within said time said buildings structures and improvements shall become a part of the realty and property of the Lessor.)

IV.

(Connected with and as a part of the development planned by the Lessee in the use of the leased premises, the Lessee contemplates wharfing out from said leased premises to the pier head line in the waterway in front of said premises, and said construction and development between said pier head line and shore line of the leased premises will, if carried out by the Lessee, occupy the area immediately in front of the foot of Missouri Street in said City of Seattle, Washington, and while Lessor consents to said contemplated use by said Lessee of said property between the shore line and the pier head line Lessee accepts and receives this lease with the understanding that the Lessor assumes no obligation with respect to the securing of any permit or permits from state or municipal authority for the construction upon, development of or use by the Lessee of the area between the east line of the leased premises, and the pier head line in front of parallel to same; but all permits lawfully required for any
9 and all development, construction and operation to be done or prosecuted by the Lessee are to be secured by the latter at its own cost and expense.)

V.

The Lessee covenants that it will not assign this lease or any interest therein, nor sub-let said premises or any part thereof, or grant

any privilege or use of said premises, or any of its appurtenances to any one whomsoever without the written consent of the Lessor first had and obtained; and the Lessee will at the termination of the lease peaceably quit and deliver up to the Lessor, its successors and assigns said leased premises and the area in front thereof to the pier head line and its appurtenances.

VI.

If the Lessee fails or neglects to pay the rentals herein reserved at the time and manner herein provided for, or neglects or fails to perform or observe any of the covenants or agreements contained in this contract to be performed and observed by it according to the terms thereof, then and in such case (notwithstanding any license of any form, breach of covenant, or waiver of or consent in any former instance) the Lessor, its successors or assigns lawfully may immediately, or at any time thereafter and without demand or notice, enter into and upon said premises, or any part thereof, in the name of the whole and repossess the same as of its former estate and expel the Lessee and those claiming through or under it, and remove their effects forcibly, if necessary, without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid, if the Lessor elects so to do this lease shall terminate and the Lessee covenants that in case of such termination it will indemnify and pay the Lessor for all loss of rent and all damages which the Lessor may incur by reason of such termination, during the residue of the period stated herein as the terms of this lease.

VII.

This lease by its terms expires on the 21st day of August, 1919, but it is agreed between the parties hereto that if the Lessee desires to extend the term of this lease for the further period of five years from the expiration of the term hereinbefore stipulated, and shall at least thirty (30) days prior to the date of the expiration of the three (3) year term covered by this lease, serve written notice upon the Lessor of such desire, and shall pay all sums herein required to be paid to the Lessor, and perform all of the agreements and covenants herein required by it, the Lessee, to be observed and performed up to and including the date of the expiration of the term hereinbefore granted, then and in such event, the Lessor will upon such request of the Lessee, extend this lease for a period of five (5) years immediately succeeding the term covered by this lease; and upon such extension being granted all the terms, conditions obligations and provision of this agreement shall continue and apply as between the parties hereto for such extended period of five (5) years.

VIII.

This agreement shall be binding upon the parties hereto and their respective successors and assigns, but by entering into this stipulation

in this contract the Lessor does not waive any of the provisions hereinbefore contained, restraining the Lessee from assigning, subletting and granting to others the right to use said premises or any part thereof, but said provisions in said lease shall continue in full force and effect.

In witness whereof, The parties hereto have caused this instrument to be executed in duplicate by their respective officers, thereunto duly authorized and their corporate seals to be hereunto affixed the day and year first above written.

11 OREGON AND WASHINGTON RAILROAD COMPANY,
By J. D. FARRELL, *President.*

Attest:
A. C. SPENCER,
Assistant Secretary.

J. F. DUTHIE & COMPANY,
By C. D. BOWLES, *President.*

Attest:
W. R. BOWLES,
Secretary.

Approved:
J. W. MORROW,
Tax & Right of Way Agent, 8-24-16.

Approved as to Form:
A. C. SPENCER,
General Attorney, 9-15-16.

12 STATE OF WASHINGTON,
County of King, ss:

On this 23d day of August, A. D. 1916, before me personally appeared C. D. Bowles and W. R. Bowles to me known to be the President and Secretary respectively of J. F. Duthie & Company, the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed thereto is the corporate seal of said corporation.

In witness whereof, I have hereto set my hand affixed by official seal the day and year in this certificate above written.

W. J. HARNED,
Notary Public for the State of Washington,
Residing at Seattle Therein.

My commission expires March 1, 1919.

STATE OF OREGON,
County of Multnomah, ss:

On this 22d day of September A. D. 1916, before me personally appeared J. D. Farrell and A. C. Spencer, to me known to be the President and Assistant Secretary respectively of the Oregon and Washington Railroad Company, the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed thereto is the corporate seal of said corporation.

In witness whereof, I have hereto set my hand and affixed my official seal the day and year in this certificate above written.

OTTO G. STOWELL,
Notary Public for Oregon.

My commission expires October 16, 1916.

13 The Secretary submitted to the meeting draft of contract dated August 22, 1916, proposed by Oregon and Washington Railroad Company, for execution by this company, covering occupancy and use of land described, being a part of Block 393, Seattle Tide Lands, situate in the City of Seattle, King County, Washington, together with improvements to be constructed thereon, for a period of three (3) years from and after August 22, 1916.

Upon motion duly seconded, it was unanimously

Resolved, that this company enter into said contract and the proper officers of this company be, and they are hereby directed to execute said agreement in the name of and on behalf of this company as of the 22d day of August, 1916.

STATE OF WASHINGTON,
County of King, ss:

I, W. R. Bowles, hereby certify that I am Secretary of the J. F. Duthie & Company, a Washington corporation, and that the foregoing is a full, true, and correct copy of a resolution passed by the Board of Directors of said J. F. Duthie & Company at a meeting duly called and held at the office of said J. F. Duthie & Company at its principal place of business on the 22d day of August, 1916, at which a quorum for the transaction of business was present.

In witness whereof, I have hereunto set my hand and affixed the corporate seal of said J. F. Duthie & Company this 22d day of August, 1916.

W. R. BOWLES,
Secretary.

14 EXHIBIT "B."

This Indenture Made This 23rd Day of November, 1916, by and between the Port Commission of the Port of Seattle and J. F. Duthie & Company, a corporation, hereinafter termed the Permittee, Witnesseth:

That Whereas, The Permittee heretofore, on the 4th day of October, 1916, made application to the Port Commission of the Port of Seattle for a permit to use a portion of the waterway situate in the Port of Seattle, hereinafter described; and it appearing that the owner of the tide lands upon which said waterway area abuts, has failed to make application as provided for under Act of Legislature approved March 22, 1913, entitled, "An Act permitting and regulating the use of the waterway areas between the boundaries thereof and Government pierhead lines and providing for the disposition of receipts therefrom"; and it appearing to the Port Commission that the said J. F. Duthie & Company is entitled to a permit for the use of the waterway hereinafter described;

Now Therefore, the Port Commission does hereby grant unto the Permittee a permit to use the following described property situate in the Port District of the Port of Seattle, and being a part of the East Waterway situate in front of Lots Six (6) to Fifteen (15) inclusive of Block 393 of Seattle Tide Lands. The portion of the waterway, the use of which is so granted being more particularly described as follows, to wit:

Beginning at the intersection of the southerly margin of West Hanford Street and the West margin of the East Waterway; thence south four hundred seventy and twenty-eight hundredths (470.28) feet to the true point of beginning; thence south along the west margin of the East Waterway seven hundred sixty-three (763) feet; thence east one hundred twenty-five (125) feet to pierhead
15 line; thence north along pierhead line eight hundred eighty-eight (888) feet; thence south forty-five (45) degrees west one hundred seventy-six and seven hundred seventy-seven thousandths (176.777) feet to point of beginning, containing 103,250 square feet; for the term of three (3) years from the 1st day of September, 1916, said date being taken as the date of the commencement of this permit.

This permit is granted in consideration of the covenants and stipulations herein contained, and the sum of Seventeen Hundred and Twenty-eight and ninety-six one-hundredths ($1,728.96) dollars rental to be paid by the Permittee for the use of said waterway area for the said period of three years. Of which amount, the sum of $1,152.64 has been paid in advance upon the delivery of this permit, said payment being made by the Permittee to the State Treasurer; the balance to be paid to the State Treasurer as follows: $288.16 on the 1st day of September, 1917, and $288.16 to be paid on the first day of September, 1918, the above payments to be remitted to the State Treasurer through the Auditor of the Port Commission.

The Permittee covenants to give and keep in force during the term

of this lease, the bond required by the said Act of Legislature in the penal sum of Five hundred ($500) dollars.

The Permittee covenants not to make or suffer to be made any artificial filling in any of said area or any deposit of rock, earth, ballast, refuse, garbage or other material within such area except such as may have been previously approved in writing by the Port Commission.

It is a condition of this permit that the area herein described, shall be improved according to the plans accompanying and attached to the Permittee's application for this permit, filed in the office of the Port Commission October 5, 1916, and numbered 41, so far as the same are embraced within the area above described, which plans, the Port Commission hereby approves.

The Permittee agrees to complete the improvement according to said plans on or before the 1st day of January, 1917, unless the time for completion shall be hereafter extended by resolution of the Port Commission. The character of said improvements may be changed either before or after the completion by the consent in writing of the Commission.

It is mutually covenanted as follows:

(1) Nothing herein contained shall confer upon, create or recognize in the Permittee any right or privilege in or to any strip of waterway abutting any street and between the prolongations of the lines of such street and the control of and right to use such strip is hereby reserved and recognized to be in the Port of Seattle. It is understood, however, that the foregoing does not apply to the extension of Missouri Avenue, said Missouri Avenue not extending into and across said waterway area at right angles thereto but extending to the waterway area from the end longitudinally.

(2) The Port Commission shall have power on sixty (60) days' notice to cancel this permit for a substantial breach by the Permittee of any of the conditions herein or for lack of bond as herein required.

(3) The Permittee hereby waives any claim for damage which may occur to these improvements by reason of dredging to a depth of minus 52 city datum and with the necessary slopes of the fairway established by Resolution No. 143 of the Port Commission.

Executed in duplicate the date herein first named.

PORT COMMISSION OF THE PORT OF SEATTLE,
By ROBERT BRIDGES,
President of the Port of Seattle.

Attest:
C. E. SEMSBERG,
Secretary of the Port Commission of the Port of Seattle.

J. F. DUTHIE & COMPANY,
By C. D. BOWLES, *President.*

Attest:
W. R. BOWLES, *Secretary.*

Filed in Clerk's Office, Jan. 6, 1917. W. K. Sickels, Clerk, by F. W. Smith.

17 In the Superior Court of the State of Washington for King County.

No. 120,010.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Affidavit of Service.

STATE OF WASHINGTON,
County of King, ss:

C. E. Bodle, being first duly sworn, on oath deposes and says: That he is now and at all times herein mentioned was a resident of the State of Washington, over the age of twenty-one years, competent to testify in the above entitled action, and not a party thereto.

That on the 22d day of December, 1916, in the City of Seattle, King County, Washington, affiant served summons and complaint in the above entitled action upon the defendant J. F. Duthie & Company, a corporation, by personally delivering to and leaving with J. F. Duthie, manager of said defendant J. F. Duthie & Company, a true copy of the summons herein and hereto attached, together with a true copy of the complaint in said action.

That on the 26th day of December, 1916, in the City of Seattle, King County, Washington, affiant served summons and complaint in the above entitled action upon the defendant Oregon & Washington Railroad Company, a corporation, by personally delivering to and leaving with C. P. Bissett, agent of said Oregon & Washing-
18 ton Railroad Company, in the State of Washington, a true copy of the summons herein and hereto attached, together with a true copy of the complaint in said action.

C. E. BODLE.

Subscribed and sworn to before me this 2d day of January, 1917.

C. J. FRANCE,
Notary Public in and for the State of Washington, Residing at Seattle.

19 In the Superior Court of the State of Washington for King County.

No. —.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Summons.

The State of Washington to the Defendants, Oregon & Washington Railroad Company, a Corporation, and J. F. Duthie & Company, a Corporation:

You and each of you are hereby summoned to appear within twenty (20) days after the service of this summons upon you, exclusive of the date of service, and defend the above entitled action in the above entitled court, and serve a copy of your answer upon the undersigned attorney for plaintiff, at his office address below stated; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which will be filed with the clerk of the above entitled court, a copy of which is herewith served upon you.

C. J. FRANCE,
Attorney for Plaintiff.

Post Office and Office Address: 436-439 Burke Building, Seattle, King County, Washington.

Filed in Clerk's Office, Jan. 6, 1917. W. K. Sickels, Clerk, by F. W. Smith, Deputy.

20 In the Superior Court of the State of Washington in and for the County of King.

No. 120,010.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Petition of Oregon & Washington Railroad Company for Removal.

To the Honorable Superior Court of the State of Washington in and for King County:

Your petitioner, Oregon & Washington Railroad Company, one of the defendants above named, respectfully shows:

I.

That this is a suit of a civil nature and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

II.

That the plaintiff, Port of Seattle, was at the time of the commencement of this suit, and still is a municipal corporation organized and existing under and by virtue of the laws of the State of Washington and of no other state, territory or nation; and said Port of Seattle was at the time of the commencement of this suit and still is a citizen of the State of Washington and of no other state, territory of nation.

21 III.

That the defendant, J. F. Duthie & Company, was at the time of the commencement of this suit and still is a corporation organized and existing under and by virtue of the laws of the State of Washington and of no other state, territory or nation; and said J. F. Duthie & Company was at the time of the commencement of this suit and still is a citizen of the State of Washington and of no other state, territory or nation.

IV.

That your petitioner, Oregon & Washington Railroad Company, was at the time of the commencement of this suit and still is a corporation organized and existing under and by virtue of the laws of the State of Oregon, and of no other state, territory or nation; and said Oregon & Washington Railroad Company, was at the time of the commencement of this suit and still is a citizen of the State of Oregon, and of no other state, territory, or nation.

V.

That the matter in dispute solely concerns the respective rights of the plaintiff, Port of Seattle, and the defendant, Oregon & Washington Railroad Company, over and in certain navigable waters of the State of Washington; and the controversy in this suit is wholly between said plaintiff and said defendant, citizens of different states, and can be fully determined as between them.

VI.

That the defendant, J. F. Duthie & Company, is not a necessary party defendant to this suit.

VII.

That the time has not elapsed wherein your petitioner is required by the laws of the state of Washington or the rules of this Honorable Court to answer or plead to the complaint of the plaintiff.

22

VIII.

That your petitioner offers herewith its bond, with good and sufficient surety, for its entering in the District Court of the United States for the Western District of Washington, Northern Division, within thirty (30) days from the date of filing this petition, a certified copy of the record in this suit, and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto.

Wherefore, Your petitioner prays that said bond be accepted and that said suit be removed to the District Court of the United States for the Western District of Washington, Northern Division, and that this court proceed no further therein.

OREGON & WASHINGTON RAILROAD COMPANY,
BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Petitioner.

23 STATE OF WASHINGTON,
County of King, ss:

W. H. Bogle, being first duly sworn according to law, does depose and say: That he is agent and attorney for the Oregon & Washington Railroad Company, petitioner above named, and authorized to make

this verification in its behalf; that he has read the foregoing petition, knows the contents thereof and believes the same to be true.

W. H. BOGLE,
Agent and Attorney for Petitioner.

Sworn and subscribed before me this 12th day of January, 1917.

[SEAL OF NOTARY.] CHARLES H. PAUL,
Notary Public in and for the State of Washington, Residing at Seattle.

Filed in Clerk's Office, Jan. 13, 1917. Percy F. Thomas, Clerk, by A. N. Olson, Deputy.

24 In the Superior Court of the State of Washington for King County.

No. 120,010.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Order Granting Petition for Removal.

The defendant, Oregon and Washington Railroad Company, having presented its petition for removal of this cause to the District Court of the United States for the Western District of Washington, Northern Division, which is in due form; and having filed herewith its bond with National Surety Company of New York, as surety, which bond and surety are satisfactory and are approved by this court;

Now, therefore, The prayer of said petition is granted and it is ordered that the record in this cause be removed into the District Court of the United States for the Western District of Washington, Northern Division, in conformity to the law in such case made and provided.

Done in open court this 13th day of January, 1917.

KING DYKEMAN,
Judge.

Filed in Clerk's Office, Jan. 13, 1917. Percy F. Thomas, Clerk, by A. N. Olson, Deputy.

25 In the Superior Court of the State of Washington in and for the County of King.

No. 120,010.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Notice of Presenting Petition and Bond for Removal.

Please take notice that the Oregon & Washington Railroad Company, one of the defendants above named will on Saturday the 13th day of January, 1917, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, present to the above entitled court its petition and bond for removal of the above entitled cause to the District Court of the United States for the Western District of Washington, Northern Division; copies of which petition and bond are handed you herewith.

Dated this 12th day of January, 1917.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Petitioner.

To C. J. France, Attorney for Plaintiff.

Due service of the inclosed Notice admitted and a true copy received this day of 12th Jan. 1917.

C. J. FRANCE,
Attorneys for Port of Seattle.

Filed in Clerk's Office, Jan. 13, 1917. Perry F. Thomas, Clerk, by A. N. Olson, Deputy.

26 In the Superior Court of the State of Washington in and for the County of King.

No. 120,010.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Bond on Removal.

Know all men by these presents: That we, Oregon & Washington Railroad Company, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto the Port of

Seattle, in the penal sum of $1,000.00, lawful money of the United States, for the payment of which sum well and truly to be made, we and each of us bind ourselves and our successors, jointly and severally, firmly by these presents.

Upon these conditions, nevertheless: That whereas the said Oregon & Washington Railroad Company has petitioned the Superior Court of the State of Washington in and for King County for the removal of a certain suit therein pending, wherein the said Port of Seattle is plaintiff and the said Oregon & Washington Railroad Company is one of the defendants, to the District Court of the United States for the Western District of Washington, Northern Division;

Now, if the said Oregon & Washington Railroad Company shall enter in said District Court of the United States, within thirty (30) days from the date of filing said petition, and shall pay all costs that may be awarded by the said District Court if said District Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof the parties hereto have set their hands and seals, at Seattle, Washington, this 12th day of January,
27 1917.

OREGON & WASHINGTON RAILROAD COMPANY,
By W. H. BOGLE,
Its Agent and Attorney.
NATIONAL SURETY COMPANY,
J. W. MAXWELL,
Resident Vice President.
E. P. WELCH,
Resident Assistant Secretary.

Approved: This 13th day of January, 1917.
KING DYKEMAN, *Judge.*

Filed in Clerk's Office, Jan. 13, 1917. Percy F. Thomas, Clerk, by A. N. Olson, Deputy.

STATE OF WASHINGTON,
County of King, ss:

I, Percy F. Thomas, County Clerk of King County, and ex-officio Clerk of the Superior Court of the State of Washington, in and for the County of King, do hereby certify that the foregoing is a full, true and correct transcript of the entire files and record in cause No. 120,010, Port of Seattle, a municipal corporation vs. Oregon & Washington Railroad Company, a corporation, and J. F. Duthie & Company, a corporation, as the same appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 1st day of Feb., A. D. 1917.

[SEAL.] PERCY F. THOMAS,
County Clerk,
By A. N. OLSON,
Deputy Clerk.

Indorsed: Record on removal from the Superior Court of the State of Washington, in and for the County of King, to the United States District Court, for the Western District of Washington, Northern Division. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 2, 1917. Frank L. Crosby, Clerk, by Ed M. Lakin, Deputy.

28 United States District Court, Western District of Washington, Northern Division.

No. 118-E.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Motion of Defendant Oregon & Washington R. R. Co. to Strike Impertinent Matter.

Now comes the defendant, Oregon & Washington Railroad Company, a corporation, by its attorneys, Messrs. Bogle, Graves, Merritt & Bogle, and moves the court to strike from the bill of complaint of the Port of Seattle all of paragraph VI thereof for the reason that the allegations therein contained are not pertinent to any issue made or tendered.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant Oregon & Washington R. R. Co.

Service of within Motion this 3d day of Feb., 1917, and receipt of a copy thereof, admitted.

C. J. FRANCE,
Attorney for Plff.

Indorsed: Motion of Defendant, Oregon & Washington R. Co. to strike Impertinent Matter. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 5, 1917. Frank L. Crosby, Clerk, by Ed M. Lakin, Clerk.

29 United States District Court, Western District of Washington, Northern Division.

No. 118-E.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Motion to Remand.

Comes now the plaintiff and moves the court to remand the above entitled cause to the State court, from whence it was removed, for trial, for the following reasons:

1. Because, as appears from the records and files herein, the amount in controversy in said action does not exceed the sum of Three thousand dollars ($3,000.00).

2. Because the said defendant J. F. Duthie & Company is a corporation organized and existing under and by virtue of the laws of the State of Washington, and said defendant is therefore a resident and citizen of the State of Washington, being the same State as that of the plaintiff herein, and that said defendant J. F. Duthie & Company is a material, indispensable and necessary party to the disposition of said cause, and that there is involved in this suit no separable controversy which is wholly between citizens of one state on the one hand and citizens of the state of Washington on the other, all of which facts are apparent from the record of this case and the affidavit of R. S. Terhune, one of the attorneys for the defendant J. F. Duthie & Company, hereto attached.

30 3. Because the State of Washington is the real party in interest as plaintiff in this action, the nominal plaintiff, the Port of Seattle, a municipal corporation, being merely the agent and representative of the State of Washington in the granting of permits or leases of waterway areas and harbor areas within said Port District; and the State of Washington being the real party in interest, said cause is not within the jurisdiction of the above entitled District Court of the United States.

Wherefore, Plaintiff says that this court has no jurisdiction to try and determine the above entitled cause, and prays that the same may be remanded to the Superior Court of the State of Washington in and for King County, from whence it came.

C. J. FRANCE,
Attorney for Plaintiff.

31 United States District Court, Western District of Washington, Northern Division.

No. —.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Affidavit of R. S. Terhune in Support of Motion to Remand.

STATE OF WASHINGTON,
County of King, ss:

R. S. Terhune, being first duly sworn, on oath deposes and says: That he is one of the attorneys for J. F. Duthie & Company in the above entitled action. That the said J. F. Duthie & Company is a corporation organized and existing under and by virtue of the laws of the State of Washington and is doing business wholly within said state, its principal place of business being in the city of Seattle, King County, Washington.

That said defendant J. F. Duthie & Company has a material interest in said action for the reason that it is now occupying the waterway area which is the subject matter of this controversy, under a permit from the Port District of the Port of Seattle, and is paying to the State of Washington, as appears from the record herein, a rental for said area of Two hundred eighty-eight and 16/100 dollars ($288.16) a year, and in consequence said defendant is materially interested in the subject matter of this controversy and the disposition thereof.

R. S. TERHUNE.

Subscribed and sworn to before me this 19th day of April, 1917.

[SEAL.] C. J. FRANCE,
Notary Public in and for the State of Washington, Residing at Seattle.

32 Copy of within Motion to Remand received and due service of same acknowledged this 20th day of April, 1917.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorney- for O. W. R. Co.

Indorsed: Motion to Remand. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 20, 1917. Frank L. Crosby, Clerk, by Ed M. Lakin, Deputy.

33 United States District Court, Western District of Washington, Northern Division.

No. 118-E.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Filed May 7, 1917.

On Motion to Remand. Motion Denied.

C. J. France, for Plaintiff.
Bogle, Graves, Merritt & Bogle, for Moving Defendant.

NETERER, *District Judge:*

The Seattle Port Commission has filed a bill of complaint against the defendants, in which it seeks to enjoin the defendant Oregon & Washington Railroad Company from exercising any jurisdiction over a certain waterway abutting upon property in Seattle described in the bill of complaint, and also a plea directing that the Oregon & Washington Railroad Company reform a certain lease executed to J. F. Duthie Company covering certain tidelands, and for certain accounting between the defendant companies. Petition for removal is filed by the defendant Oregon & Washington Railroad Company on the ground of diverse citizenship and separable controversy, alleging that the amount involved is in excess of $3,000.00. It is contended on the part of the plaintiff that Duthie & Company is a Washington corporation, and hence the cause is not removable on the ground of diverse citizenship. It is also contended that the rental value of the
34 land involved as shown by the lease attached to the complaint and made a part thereof, is $1,728.96, and further that the State of Washington is a real party in interest in that it reserved interest in tidelands, pursuant to the provisions of Chapter 168, Laws Washington, 1913, and that it has legislated with relation to the use of water areas between the boundaries thereof and Government pier lines, and provided for disposition of receipts therefrom. The moving defendant contends that the amount involved is in excess of $3,000.00 and no issue being taken to the allegations of the petition for removal, that must be conceded, and likewise that there is a separable controversy that is disclosed by the face of the complaint, and that Duthie & Company is not a real party in interest, and further that the State of Washington is not a party to this proceeding, nor is it the real party in interest.

There is nothing disclosed upon the face of the complaint or the petition for removal which would indicate to the court any interest in the controversy on the part of the State of Washington, but on

argument the court's attention was called to Session Laws 1913, supra, and the thought emphasized that the entire control of the waterway and the lands in dispute is in the state, and such being the fact that the State is the real party in interest. On page 584 Laws 1913, supra, it is provided:

"In any case where such waterway shall be within the territorial limits of the Port District given under the laws of the State of Washington, the duties herein assigned to the State Land Commissioner shall be exercised by the Port Commission of such Port District, and in every case the rentals received shall be disposed of as follows * * * ",

and then provides that 75 per cent. shall be paid to the County Treasurer in which the District is situated and 25 per cent. to the State Treasurer. It further provides that:

35 "Nothing herein contained shall confer upon, create or recognize in any abutting owner any right or privilege in or to any strip of waterway abutting any street and between prolongations of the lines of such streets, but the control of right to use such strip is hereby reserved to the State of Washington, except that in cases situated in a Port District such control and use shall vest in such Port District."

From an examination of the act I think it is apparent that it was the intent and purpose of the State that all interest of the State was vested in the Port District, and hence the State, so far as the issue here is concerned, is not a party in interest.

I think there is a separable controversy. I do not think that Duthie & Company is a real party in interest. Whatever interest Duthie & Company asserted by reason of the lease from the Oregon & Washington Railroad Company was surrendered to the Port of Seattle by attorning to it in the execution of the lease with the Port of Seattle. All of the rights which the Port of Seattle could hope to obtain from Duthie & Company by decree of the court already are vested in it by the operation of the lease executed voluntarily by the said defendants. Hence the defendant Duthie & Company is not a party in interest to determine the issue between the Port of Seattle and the defendant Oregon & Washington Railroad Company. If an accounting is necessary between the Oregon & Washington Railroad Company and Duthie & Company, that is a concern of theirs and not of the Port of Seattle; nor is the court concerned about that in this case. The amount involved the court must find to be in excess of $3,000.00. The rental value of the property in dispute for three years is not the criterion of the value of the property. The object of the prayer of the complainant is not to enjoin the defendant from exercising acts of ownership over the land in dispute

36 for the period of the lease, but forever. Hence, in view of the allegations of the petition for removal as to value, the court must find that the value is such as to bring it within the jurisdiction of this court.

The motion to remand is denied.

JEREMIAH NETERER,
Judge.

Indorsed: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 7, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

37 United States District Court, Western District of Washington, Northern Division.

No. 118-E.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Order Denying Motion to Remand.

This cause having come on to be heard on the 7th day of May, 1917, upon plaintiff's motion to remand to the State Court and and having been argued by counsel, the court being advised in the premises, upon consideration thereof, it is ordered that said motion be and it is hereby denied. Plaintiff excepts and an exception is allowed.

Done in open court this 9th day of May, 1917.

JEREMIAH NETERER,
Judge.

O. K. as to form—
C. J. FRANCE.

Indorsed: Order Denying Motion to Remand. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 9, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

38 United States District Court, Western District of Washington, Northern Division.

No. 118-E.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Order Granting Motion to Strike.

This cause having come on to be heard upon the defendant Oregon & Washington Railroad Company's motion to strike Paragraph VI of the plaintiff's bill of complaint, and having been argued by counsel and the court being advised in the premises;

It is ordered that said motion be granted;

And it is further ordered that the plaintiff be given leave to file an amended bill or to stand upon its present bill and this order and that the defendant, Oregon & Washington Railroad Company be given ten days within which to answer the bill or amended bill after the plaintiff shall have signified its intention to stand upon its present bill and this order or shall have served its amended bill.

Plaintiff excepts and its exception is allowed.

Done in open court this 22d day of May, 1917.

JEREMIAH NETERER,
Judge.

Form O. K.
C. J. F.

Indorsed: Order Granting Motion to Strike. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 22, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

39 United States District Court, Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Answer of Oregon & Washington Railroad Company.

The Oregon & Washington Railroad Company, one of the defendants above named, answering the bill of complaint of the Port of Seattle, says:

I.

That this defendant admits the allegations contained in paragraphs I, II and III of said bill of complaint.

II.

That this defendant admits the allegations contained in paragraph IV of said bill of complaint, saving and excepting the allegations that the waterway area therein described is within the jurisdiction of the plaintiff and that this defendant has no right, title or interest therein, which allegations this defendant denies.

III.

And this defendant avers that the waterway mentioned in
40 paragraph IV of the bill of complaint was laid out and established by the Board of Harbor Line Commissioners of the State of Washington pursuant to an Act of the Legislature of said State entitled: "An Act to establish and define public ways for water craft across the tide flats within, in front of, and for a mile either way from all incorporated cities and towns in the State of Washington," approved March 28, 1890, through, over and across certain tide lands then owned by the State of Washington situate within, in front of, and for a mile on either side of the City of Seattle, in King County in said State, to the width of 1000 feet, commencing at the deep waters of Elliott Bay and extending inland across said tide lands a great distance, and thereafter, on or about March 15, 1895, a plat thereof, together with the surrounding tide lands—which include the lands described in the bill of complaint and now owned by this defendant—was made and filed by said Board with the Secretary of State, with the Commissioner of Public Lands of the State, in the office of the chairman of said board and in the office of the Auditor of King County; that there was established by said board, and shown on said plat as filed and recorded, a line designated thereon "Pier Head Line," located within the limits of said waterway, parallel with the 125 feet distant from the shoreline on each side thereof, and said "Pier Head Line" has been adopted by the War Department of the United States as prescribing the limits beyond which structures obstructing navigation will not be permitted in said waterway; that said waterway was caused to be excavated by the State of Washington pursuant to an Act of the Legislature of said State entitled: "An Act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands
41 belonging to the state, granting rights of way across lands belonging to the state," approved March 9, 1893, and said waterway thereupon became by virtue of said Act of 1890 and said Act of 1893, and the plats filed and the things done in pursuance thereof, a public waterway, forever reserved from sale or lease as a public way for water craft, and free to all citizens upon equal terms, subject only to the jurisdiction of the proper authorities to regulate navigation therein; that the tide lands through which said waterway was created and established—all of which were owned by the State of Washington—were platted into blocks and lots abutting upon said waterway by said Commission, and the lots described in the bill of complaint were accordingly shown upon the aforesaid official plat as abutting upon said waterway on the west; and that, thereafter, said tide lands, including the lots described in the bill of complaint, together with the appurtenances, were sold by the State of Washington to various and sundry persons, and this defendant, in good faith and for a valuable consideration, by mesne

conveyances became the owner of the lots described in the bill of complaint, together with the appurtenances and hereditaments thereunto appertaining, prior to the year 1913, to wit, in the year 1910.

IV.

And this defendant further avers that the jurisdiction claimed by the port of Seattle over said waterway in paragraph IV of its bill of complaint is based upon an Act of the Legislature of the State of Washington entitled: "An Act permitting and regulating the use of waterway areas between the boundaries thereof and government pierhead lines and providing for the disposition of receipts
42 therefrom," approved March 22, 1913, which by its terms purports to prohibit the erection of any structures in the waterway area of certain waterways—of which the waterway described in the bill of complaint and hereinbefore referred to is one—wherein the waterway area is between the boundaries of the waterway as established by the State of Washington and the pier head line shown upon the official plat hereinbefore referred to—except by permission of the State Land Commissioner, or the Port Commission, when such area is within the territorial limits of a port district—as is the area above referred to,—and upon the terms therein provided; but which act, in truth, provides for the leasing of such waterway areas, and particularly the waterway area above referred to, for a term of years and for a rental therein described.

V.

And this defendant further avers that the lands described in the bill of complaint were acquired by it in reliance upon the permanent continuance of the waterway created as hereinbefore set out, and are chiefly valuable because of their accessibility to said waterway and through it to the waters beyond and because of the riparian and shore rights appurtenant thereto, and that the acts and things done on the part of the State of Washington in creating and establishing said waterway, and the declarations in the above mentioned Acts of its legislatures contained, make and constitute a contract between said state and this defendant and all other purchasers of property abutting thereon that said waterway or any part thereof would never be sold, leased, or otherwise disposed of; and this defendant avers that the Act approved March 22, 1913, above referred to, impairs the obligation of that contract, in violation of Section 10, Article I of the Constitution of the United States
43 and Section 23, Article I of the Constitution of the State of Washington.

VI.

And this defendant further avers that the lands abutting upon said waterway, of which are the lands of this defendant, as herein-

before set forth, are chiefly valuable by reason of their accessibility to said waterway and through it to the waters of Elliot Bay and Puget Sound beyond; that the right to navigate said waterway includes the right to come to, to land upon and to leave the shores abutting thereon, in the interest of commerce, not only to the abutting owners but to the public who may have business and occupation with them or through them with each other, and as well the right to construct wharves, docks and piers, on the shores of and extending into said waterway in aid and promotion of navigation and commerce, provided they do not extend beyond the pier head lines established and adopted as hereinbefore referred to, subject only to proper and reasonable control and regulation by the State of Washington and the United States in the public interest; and this defendant avers that the Act approved March 22, 1913, hereinbefore referred to, and the right or claim asserted by the Port of Seattle thereunder to lease the waterway area hereinbefore described for wharves and docks, and to collect, receive and enjoy the rentals therefrom, and to deny to and deprive this defendant of the right to construct such wharves and docks, or to lease said area for such proper purposes and to receive and enjoy the rentals therefrom, deprives it of these rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Section 3, Article I of the Constitution of the State of Washington.

44 Having this made full answer to all the matters and things contained in the bill of complaint, this defendant prays to be dismissed with its costs in this behalf incurred.

W. H. BOGLE,
BOGLE, GRAVES, MERRITT & BOGLE,
Solicitors and Attorneys for Defendant Oregon & Washington Railroad Company.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

W. H. Bogle, being first duly sworn, on oath does depose and say: That he is Agent and Attorney for the Oregon & Washington Railroad Company, on whose behalf the foregoing answer is made; that he has read the same, knows the contents thereof and believes the same to be true.

W. H. BOGLE.

Subscribed and sworn to before me this 15th day of June, 1917.

EUGENE C. LUCCOCK,
[SEAL.] *Notary Public in and for the State of Washington, Residing at Seattle.*

Service of within answer this 15th day of June, 1917, and receipt of a copy thereof, admitted.

C. J. FRANCE,
Attorney for Plaintiff.

Indorsed: Answer of Oregon & Washington Railroad Company. Filed in the U. S. District Court, Western District of Washington, Northern Division, June 18, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

45 United States District Court, Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Election of Plaintiff to Stand Upon its Complaint.

The court having heretofore entered an order striking Paragraph VI of plaintiff's bill of complaint, and said order having provided that the defendant Oregon & Washington Railroad Company should have ten days within which to answer the bill or amended bill, after the plaintiff shall have signified its intention to stand upon its present bill.

The plaintiff herein does hereby elect to stand upon its present bill of complaint.

Dated this 18th day of June, 1917.

C. J. FRANCE,
Attorney for Plaintiff.

Copy of within Election of Plaintiff received and due service of same acknowledged this 18th day of June, 1917.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Deft. Oregon & Wash. R. Co.

Indorsed: Election of Plaintiff to Stand upon its Complaint. Filed in the U. S. District Court, Western Dist. of Washington Northern Division, June 20, 1917. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

46 United States District Court, Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Answer of Defendant J. F. Duthie & Co.

Comes now J. F. Duthie & Co., a corporation, one of the defendants in the above entitled action, and answering the complaint of the above named plaintiff, says:

I.

This defendant admits the allegations contained in paragraphs I, II, III, V and VI of said complaint.

II.

This defendant admits the allegations contained in paragraph IV of said complaint, with the exception of the allegations that the waterway area therein described is within the jurisdiction of the plaintiff, and that the defendant Oregon & Washington Railroad Company has no right, title or interest in said waterway area by the Oregon & Washington Railroad Company or by the defendant Duthie & Co., claiming under said Oregon & Washington Railroad Company, is wholly unfounded, which allegations this defendant states that it has no knowledge or information sufficient to form a belief as to their truth or falsity and therefore
47 denies same, and requires plaintiff to prove the truth thereof.

III.

And further answering said complaint, and by way of affirmative matter, this defendant avers that on, to wit, the 22d day of August, 1916, the defendant Oregon & Washington Railroad Company made and executed and thereafter acknowledged and delivered the certain indenture of lease to this defendant mentioned in paragraph III of plaintiff's complaint and attached thereto; that in and by said lease it was contemplated that the lessee would wharf out from said leased premises to the pier head line adopted by the State of Washington and the United States in the waterway in front of said

premises, and would construct improvements upon and develop and use said waterway areas between the east line of said lease premises and the pier head line in front of and parallel to same; that in said lease the said Oregon & Washington Railroad Company refused to assume any obligations with respect to the securing of any permit or permits from state or municipality authority for the wharfing out, construction upon, development of, or use by said lessees J. F. Duthie & Co. of said waterway area between the east line of the leased premises and the pier head line in front of and parallel to same, but required all permits lawfully required for any and all such development, construction and operation, to be secured by said Duthie & Co. at its own costs and expense.

IV.

That at said time the plaintiff Port of Seattle claimed to have jurisdiction over the waterway area between the east line of said leased premises and the pier head line in front of and parallel to the same, as established and adopted by the State of Washington and the United States, as well as the right to construct wharves and other improvements upon and to develop and use said water-
48 way area and to lease said waterway area for wharves, docks and other uses in the aid and promotion of navigation and commerce.

V.

That by reason of the refusal of the defendant Oregon & Washington Railroad Company to assume the obligation to secure any permit or permits from the plaintiff Port of Seattle for the wharfing out, construction upon, development of or use by said Duthie & Co. of said waterway area and the claims of jurisdiction and ownership therein of the plaintiff Port of Seattle, as hereinbefore set forth, this defendant was compelled to and did on or about the 23d of November, 1916, make application to plaintiff Port of Seattle for a permit for the use of said waterway area described in said lease, which said application was on or about said November 23, 1916, granted by said Port of Seattle, and a copy of said permit is set out in paragraph V of said complaint.

VI.

That this defendant has no knowledge as to who is the true owner of or entitled to exercise jurisdiction over said waterway area, and desires to have the rights and equities of the plaintiff and the defendant Oregon & Washington Railroad Company therein legally ascertained and determined, and alleges that it will abide whatever judgment is finally lawfully entered herein.

Wherefore, this defendant prays that the respective rights and equities over said waterway area of the plaintiff and the defendant

Oregon & Washington Railroad Company be legally ascertained and determined, and that it recover its costs herein, and that it have such other and further or different relief as to the court
49 may seem meet and equitable in the premises.

AUST & TERHUNE,
Attorneys and Solicitors for Defendant
J. F. Duthie & Co.

UNITED STATES OF AMERICA,
State of Washington, County of King, ss:

C. D. Bowles, being first duly sworn on oath, deposes and says: That he is President of J. F. Duthie & Co., a corporation, one of the defendants in the above entitled action, and makes this verification upon its behalf; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true.

C. D. BOWLES.

Subscribed and sworn to before me this 19th day of October, 1917.

R. S. TERHUNE,
Notary Public in and for the State of
[SEAL.] *Washington Residing at Seattle*

Copy of within Answer received and due service of same acknowledged this 19th day of October, 1917.

C. J. FRANCE,
Attorney for Pltf.
BOGLE, GRAVES, MERRITT & BOGLE,
Attys. for Dft. Oregon & Washington R. R. Co.

Indorsed: Answer of Defendant J. F. Duthie & Co. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 20, 1917, Frank L. Crosby, Clerk.

50 United States District Court, Western District of Washington, Northern Division.

No. 118.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

September 9, 1918.

C. J. France, for Plaintiff.
Bogle, Graves, Merritt & Bogle, for Defendant Oregon-Wash. Ry. Co.
Aust & Terhune, for Defendant J. F. Duthie & Co.

NETERER, *District Judge:*

This is an action brought by the plaintiff to enjoin the defendants from asserting or claiming any proprietary interest in what is known as the waterway area in the East Waterway situated in the port district of the City of Seattle. The land owned by the defendant company was originally submerged tide lands and at the time of the adoption of the constitution owned by the State. In 1894 and 1895 the State Board of Land Commissioners, pursuant to law (Laws 1889, 1890 and 1893 adopted and filed a plat of the state owned tide lands, creating the East and West Waterways and establishing a pier headline 250 feet from the "Bulk Headline" and approved contracts for the excavation of said waterways and filling in of the state-owned tide lands in the vicinity thereof; and thereafter the title to the lots in issue passed from the state and through mesne conveyances now rest in the defendant railroad company. The East and West Waterways, thus created, form the outlet of the Duwamish River, a navigable stream. The East Waterway represents one of the original channels at the mouth of said river, the other
51 channel being represented by the West Waterway. The tide lands reclaimed with the material excavated from the East and West Waterways now constitutes a large section of the industrial and business section of the city. These lands lie more than a mile from the original shore line.

The defendant, Oregon & Washington Railroad Company, leased to J. F. Duthie & Company, a corporation, these lots bordering upon the East Waterway for the purpose of establishing a shipyard and therewith leased the right to build into the waterway necessary structures. The waterway is one thousand feet wide, extending from Elliot Bay through the reclaimed tide lands. The plaintiff thereafter, for value, leased to the same company the right to build in the waterway such structures as it required.

The plaintiff contends that the State of Washington has the sole and exclusive proprietary interest in the East and West Waterways, subject only to the right of the United States government to regulate the same in aid of navigation and that the right of the state has been transferred by proper legislative authority to the plaintiff in this case. The defendant disputes the right of the plaintiff to exercise the right of ownership over this area not for the purpose of supervision and regulation, but for revenue and to the destruction of the proprietary rights of the defendant.

I think the claim of the defendant in argument, that the conduct of the plaintiff is in violation of the provisions of Article XV, Section 1, of the Constitution of the State, may be passed for the reason that the issue is not the right of the plaintiff to subject this area to any particular use, but it is the right of the defendant to the particular area which is challenged.

It is conceded that the plaintiff, as the State's agency has governmental power and supervision as will prevent the construction and maintenance of any structure in the waterway that interferes with or obstructs navigation or the proper use of the waterway for commerce and navigation. It is also conceded that the rights of the parties to this proceeding are to be measured by the rules and
52 decisions of the State court. Such, at any rate, I believe to be the law. St. Anthony Falls Water Power Company v. St. Paul Water Commissioners, 168, U. S. 349.

As a basis for the contentions it may be stated that by the provisions of Section 1, Article XVII of the Constitution of Washington, the State asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide, in waters where the tide ebbs and flows and up to and including the line of high water within the banks of all navigable rivers and lakes.

Article XV of the Constitution empowers the legislature to provide for the appointment of a Commission, whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets in the state, wherever such navigable waters lie within or in front of the corporate limits of any city or town or within one mile thereof upon either side.

The same Article, Section 2, provides that the legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks and other structures upon the areas mentioned in Section 1, but limits the terms for which they shall be made and grants to municipal corporations the rights to establish streets over intervening tide lands.

The Legislature of 1889 and 1890 created a Board of State Land Commissioners and conferred upon it the power of the Harbor Land Commissioners. It also passed a law (1893) providing for the creation of public waterways across state owned tide lands near cities and towns.

The ownership of the beds of all tide lands is in the state, unless it has been granted away. McCreadie v. Virginia, 94 U. S. 391.

New states, upon admission into the Union, have the same rights as the "original states" in the tide waters and in the lands below high water mark within their respective jurisdictions. Shively v. Bowlby, 152 U. S. 1.

53 By the rules and decisions of the Supreme Court of Washington it would appear that a riparian owner has no proprietary interest below high water mark (1); nor has the owner of littoral lands a right except as a member of the public for the purpose of navigation and fishery (2). At common law there was no easement.

(1) Fisenbach v. Hatfield, 2 Wash. 236; 26 Pac. 539; 12 L. R. A. 632; Pierce v. Kennedy, 2 Wash. 324; 26 Pac. 554; 28 Pac. 35; Baer v. Moran Bros. Co. 2 Wash. 608; 27 Pac. 470; Board of Harbor Line Com'rs. v. State ex rel. Yesler, 2 Wash. 530; 27 Pac. 550; State ex rel. Stimson Mill Co. v. Board of Harbor Line Com'rs, 4 Wash. 6; 29 Pac. 938 State ex rel. Columbia & P. S. R. Co. v. Board of Harbor Line Com'rs. 4 Wash. 816; 30 Pac. 734; Morse v. O'Connell, 7 Wash. 117; 34 Pac. 426; Allen v. Forrest, 8 Wash. 700; 36 Pac. 971; 24 L. R. A. 606; Lownsdale v. Grays Harbor Boom Co. 21 Wash. 542; 58 Pac. 663; Sullivan v. Callvert 27 Wash. 600; 68 Pac. 363; McCue v. Bellingham Bay Water Co. 5 Wash. 156; 31 Pac. 461; Washougal & Lo Camas Transp. Co. v. Dalles etc. Nav. Co. 27 Wash. 490, 68 Pac. 74; Kalez v. Spokane Val. Land etc. Co. 42 Wash. 43; 84 Pac. 395; Van Siclen v. Muir 46 Wash. 38; 89 Pac. 188; Muir v. Johnson, 49 Wash. 66; 94 Pac. 899; Brace & Hergert Mill Co. v. State, 49 Wash. 326; 95 Pac. 278; Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83; 102 Pac. 1041; Lownsdale v. Grays Harbor Boom Co. 84 Wash. 542; 103 Pac. 833; Palmer v. Peterson, 56 Wash. 74; 105 Pac. 179; Bilger v. State, 63 Wash. 457; 116 Pac. 19; Austin v. Bellingham, 69 Wash. 677; 126 Pac. 59; State v. Sturtevant, 76 Wash. 158; 135 Pac. 1035; Commercial Waterway District v. Seattle Factory Sites Co. 76 Wash. 181; 135 Pac. 1042; Newell v. Loeb, 77 Wash. 182; 137 Pac. 811; State ex rel. Ham, Yearsley etc. v. Sup'r Ct., 70 Wash. 442; 126 Pac. 945; Hill v. Newell, 86 Wash. 227; 149 Pac. 951; Washington Boom Co. v. Chehalis Boom Co. 90 Wash. 350; 156 Pac. 24; Puget Mill Co. v. State, 93 Wash. 128; 160 Pac. 310.

(2) Shively v. Bowlby, 152 U. S. 1; Commonwealth v. Alger, 61 Mass. 53, 66, 77; Murphy v. Bullock, 20 R. I. 35, 39; 37 Atl. 348; Providence v. Comstock, 65 Atl. 307; (R. I.); Chapman v. Kimball, 9 Conn. 38; Brookhaven v. Smith, 188 N. Y. 74; 80 N. E. 665; Stevens v. Patterson, etc. R. R. Co. 34 N. J. 532; Naglee v. Ingersoll, 7 Pa. 185; Bailey v. Railroad Co. 4 Harr. 389 (Del.); Day v. Day, 22 Md. 530; French v. Bankhead, 52 Va. 136 (11 Gratt.) Ward v. Willis, 51 N. C. 183; State v. Guano Co., 22 S. C. 50; Johnson v. State, 114 Ga. 790; 40 S. E. 807; State v. Black River etc. 32 Fla. 82; 13 So. 640; State v. Gerbing, 56 Fla. 603 47 So. 353; Turner v. Mobile, 135 Ala. 73; 33 So. 132; Bullock v. Wilson, 2 Port, 436 (Ala.); Martin v. O'Brien, 34 Miss. 21; Galveston v. Heidenskeimer, 63 Tex. 559; Dana v. Wharf Co. 31

Cal. 118; Pacific Elevator Co. v. Portland 65 Ore. 349; 133 Pac. 72 State v. Korrer, 148 N. W. (Minn.) 617; Attorney General v. Smith 109 Wis. 532 85 N. W. 512; Revell v. People, 177 Ill. 468; 52 N. E. 1052; State v. Venice, 160 Mich. 680; 125 N. W. 770; Ryan v. Brown, 18 Mich. 196; Ravenswood v. Fleming, 22 W. Va. 52; State v. Land Co. 158 S. W. 746 (Tenn.); Harrison v. Fite, 148 Fed. 781; State v. Akers 140 P. 637 (Kan.); Tomlin v. D. B. & M. R. Co. 32 Ia. 106; U. S. v. Mackey, 214 Fed. 137; Callahan v. Price, 146 P. 734 right to wharf (3). Such right, when exercised, was by virtue of local legislation or by custom which received local endorsement.

54 While the issue before the court is not to determine the right of the respective parties to this waterway, but the right of the defendant to lease a portion of the waterway for the purpose to which it is devoted, yet I think it may be stated in this connection that Justice Burton, in speaking for the court in U. S. v. Chandler-Dunbar W. P. Co. 229 U. S. 53, stated the rule, at page 64:

The primary use of the waterways and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of the riparian owner in the submerged lands in front of this upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such waters. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

And in Ex parte Easton, 95 U. S. 68, when it said

"Wharf accommodation is a necessity of navigation, and such accommodations are indispensable for ship and vessels and watercraft, of every name and description whether employed in carrying freight or passengers, or engaged in the fisheries. Erections of the kind are construed to enable ships, vessels and all sorts of water craft to lie in port in safety, and to facilitate their operation in loading and unloading cargo and in receiving and landing passengers.

"Piers or wharves are a necessary incident to every well regulated port, without which commerce and navigation would be subjected to great inconvenience, and be exposed to vexatious delay and constant peril."

(3) Shively v. Bowley 152 U. S. 1; Commonwealth v. Alger, 61 Mass. 53; Austin v. R. R. Co. 45 Vt. 215; Providence v. Comstock 65 Atl. 307 (R. I.); Real Estate Co. v. Mackenzie, 82 Atl., 804 (R. I.); Stevens v. Patterson & Newark R. R. Co. 34 N. J. 532; Naglee v. Ingersoll, 7 Pa. 185; Tinicum etc. v. Carter, 61 Pa. 21; Valentine v. White, 2 Gill, 444 Syl. (Md.) Day v. Day 22 Md. 530; France v. Bankhead, 52 Va. 136 (11 Gratt.); State v. Black River Phosphate Co. 32 Fla. 82, 13 So. 640; Martin v. O'Brien,

34 Miss. 21; Dana v. Wharf Co. 31 Cal. 118; Pacific Millings Co. etc. v. Portland 65 Ore. 349, 133 Pac. 72; Eisenbach v. Hartfield 2 Wash. 236; Revell v. People 177 Ill. 468, 52 N. E. 1052; Ryan v. Brown, 18 Mich. 196; Ravenswood v. Fleming, 22 W. Va. 52.

In Illinois Central Railroad Company v. Illinois, 146 U. S. 387 where nearly a thousand acres of wharfage territory along the lake in front of Chicago was claimed by the State, it having been
55 granted to the railway company, the court said, at page 452:

"That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants."

A similar issue was determined in Long Sault Development Co. v. Kennedy, 212 N. Y. 1; 105 N. E. 844. At page 8 the court said:

"The power of the legislature to grant lands under navigable waters to private persons or corporations for beneficial enjoyment has been exercised too long and has been affirmed by this Court too often to be open to serious question at this late day. The contemplated use, however, must be reasonable and one which can be fairly said to be for a public benefit or not injurious to the public."

Now the highways of a state, whether on land or by water, shall be best improved for the public good is a matter for state determination, subject always to the right of Congress to interpose in the cases mentioned.

In the case of Morris v. U. S. 174 U. S. 196, speaking of the waterfront of the City of Washington, the court said at page 251:

"As a national city was to be founded * * *, and as the site selected was on a navigable, tide water river, inviting foreign and domestic commerce, we should naturally expect to find the city located in immediate proximity to the river, with public wharves and landings, and with a municipal ownership and control of the streets and avenues leading to and bounding on the stream."

Strictly speaking, the defendant is not a riparian owner. The waterway is artificial, a creature of the state, created out of state-owned tidelands and for the purpose of commercial and industrial development of the city. The original owners of the land on the

shores of Elliott Bay are removed more than a mile from these
56 lands and between the two points are located manufacturing industries, warehouses, city streets with car lines, etc.

In Dana v. Jackson Street Wharf Co., 31 Cal. 118, the Supreme Court held that under such conditions an owner to be not a riparian proprietor in the sense in which that term is used in the law of tide waters.

As to the contention that the Laws of 1913, supra, impair the obligations of a contract, it may be said:

Section 5, Act of 1890, providing that:

"All public ways that may be established under the provision of this act are and shall forever be reserved from sale or lease as public ways for water crafts."

and Laws 1913, supra:

"An act permitting and regulating the use of waterway areas between the boundaries thereof and government Pier Head Lines and providing for the disposition of receipts therefrom;"

and Article XV of the State Constitution, must be construed together. No interest was given to the upland owner by the act of 1890; no right to build a structure into the waterway or to make a lease which would authorize the right to build a structure therein was granted. No private owner would have a right to build a structure in the waterway, whether within or without the Pier Head Line, Section 5, supra, is related to Article 15 of the State Constitution, by which it is specifically provided that the Legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks, and other structures upon the areas mentioned in Section 1, where reference is made to the location and establishment of the proper lines of navigable courses of all harbors etc., and whether the laws of 1913, supra, attempt to curtail any right of the defendant previously granted it is not necessary to determine.

What has been said, I think, shows that the waterways are "public ways for water craft" and are to be devoted to the aid of commerce and navigation, and that the defendant has no proprietary interest in the waterway, but that it has some interest above that of the public, must follow from the fact that the State—owner of
57 the upland—platted the land, constructed the waterway and sold the land with relation thereto. Accessibility to deep or navigable water gave added value to this land. The Supreme Court of the State, in State v. Sturtevant, 76 Wash. 158, at page 166, said:

"Now, if, in the exercise of its functions, the state sells its shore lands, we may assume that this privilege entered into, and became a part of, the consideration for its deed; so that the state could not, either by its own act or by granting the privilege to another to extend the line of navigation, destroy the substance of its deed * * *"

and the 1913 law, supra, in so far as it contravenes this right, must be held inoperative.

The court also says in the same case, at page 165:

"The right of a * * * shore owner to * * * erect docks and piers, though sometimes denied, is now well settled."

The extent to which the plaintiff may supervise the wharfage privilege; or the toll, if any, it may exact from the defendant, is not before the court. The plaintiff and defendant have each leased for value the land in issue to the same party for the same purpose. Neither has a right to do so. The plaintiff being itself a transgressor must purge itself of fault before it can have standing in a court of equity. The action may be dismissed. No cost to either party.

JEREMIAH NETERER,
Judge.

Indorsed: Decision. Filed in the United States District Court, Western District of Washington, Northern Division, Sep. 9, 1918. F. M. Harshbeger, Clerk. By S. E. Leitch, Deputy.

58 United States District Court, Western District of Washington, Northern Division.

No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, et al., Defendants.

Decree.

This cause having come on to be heard upon the pleadings and the evidence introduced in open court, and arguments of solicitors both on behalf of the complainant and the defendants having been heard, and the cause duly considered, the court finds:

That the complainant has no proprietary rights or interests in the water area between the shore line and the pier-head line in front of the lots owned by the defendant, Oregon & Washington Railroad Company, described in the pleadings herein, and is not entitled to lease the same, nor to deprive the defendant, Oregon & Washington Railroad Company, of access to the navigable waters of said waterway over said water area; and that the provisions of Chapter 169 of the Laww of Washington of 1913, providing for such leasing and collection of revenue therefor, are invalid because the same are in conflict with Section 10, Article I of the Constitution of the United States and with the XIVth Amendment to said Constitution.

That the defendant Oregon & Washington Railroad Company has no proprietary interest in said water area, but as the owner of the abutting lots is entitled to access to and from said lots to and from the

deep or navigable waters of said waterway across said water area, subject to proper Governmental supervision.

59 The court further finds that the State has never established any harbor lines in said waterway, but does not adjudicate upon the right of the State to hereafter establish harbor lines therein or the effect the establishment of such harbor lines would have upon the rights of the parties hereto in such waterway.

The court being of the opinion that complainant is not entitled to any equitable relief herein;

It is ordered and decreed that said bill of complaint be, and the same is, hereby dismissed, without costs to either party.

Ordered and decreed in open court, this 13th day of February, 1919.

JEREMIAH NETERER,
Judge.

Indorsed: Decree. Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 14, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

60 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, et al., Defendants.

Order Entering Exceptions.

Now at the time of the entry of the decree in the above entitled cause, complainant appearing in open court by its attorneys Messrs. Preston, Thorgrimson & Turner, excepts to the entry of the said decree and to every part of the said decree, and specially excepts to the said decree as follows:

1. Complainant excepts to the decree of the court that complainant has no proprietary rights or interest in the water area between the shore line and the pier head line in front of the lots owned by the defendant, Oregon & Washington Railroad Company, described in the pleadings herein.

2. Complainant excepts to the decree of the court that complainant is not entitled to lease the said water area.

3. Complainant excepts to the decree of the court that complainant is not entitled to deprive the defendant, Oregon & Washington Railroad Company, of access to the navigable waters of said waterway over said water area.

4. Complainant excepts to the decree of the court that the provisions of Chapter 169 of the Laws of Washington of 1913, providing for leasing and collection of revenue, are invalid.

5. Complainant excepts to the decree of the court that the defendant, Oregon & Washington Railroad Company, as the owner of the abutting lots, is entitled to access to and from said lots to and from the deep or navigable waters of said waterway across said
61 water area.

6. Complainant excepts to the decree of the court that the state has never established any harbor lines in said waterway.

7. Complainant excepts to the decree of the court that complainant is not entitled to any equitable relief herein.

8. Complainant excepts to the decree of the court dismissing the bill of complaint herein.

It is now by the court ordered that the said exceptions be and the same are now hereby entered of record.

Done in open court this 13th day of February, 1919.

JEREMIAH NETERER,
Judge.

Indorsed: Order Entering Exceptions. Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 14, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

62 United States District Court, Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Stipulation.

It is now stipulated that the Statement of Evidence now on file in the above entitled court shall be approved and certified by any Judge of the above entitled court, and that notice of the time and place when the same is so to be certified is hereby waived, and that an order may be entered directing the attaching of exhibits thereto as suggested in the notice hereinbefore given by attorneys for complainant relating to said matter and now on file.

It is further stipulated that the amount of security to be given by complainant on appeal to the Supreme Court of the United States may be fixed in the sum of Five hundred dollars ($500.00).

PRESTON, THORGRIMSON & TURNER,
Attorneys for Complainant.
BOGLE, MERRITT & BOGLE,
Attorneys for Defendant
Oregon & Washington Railroad Company.
AUST & TERHUNE,
Attorneys for Defendant
J. F. Duthie & Company.

Indorsed: Stipulation. Filed in the United States District Court, Western District of Washington, Northern Division, Apr. 15, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

63 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, et al., Defendants.

Statement of Evidence under Equity Rule 75.

Mr. France, attorney for complainant, renewed his motion to remand the case to the State court, with the understanding that the argument upon the motion to remand should be made at the close of the case.

Upon stipulation of counsel in open court, Exhibit 1 was admitted to evidence, said Exhibit 1 being a map showing the portion of the East Waterway involved in this case and certain portions of the abutting tidelands, accompanied by certificate of the Commissioner of Public Lands.

Testimony of J. D. Blackwell, Witness for Complainant.

I am a civil engineer and have been for twenty-three years. Have resided in Seattle since 1899, and during all that time have been engaged in all classes of engineering work. In the latter part of 1902 I made certain experiments for Will H. Parry, president of the Seattle-Lake Washington Waterway Company, in the handling of dredged material, and from 1902 to the early part of 1904 I was consulting engineer for that company. From 1904, for about a year or a year and a half, I was with the Puget Sound Bridge & Dredging Company, which was doing the dredging on the tide flats in Seattle, and I still retain my interest and work in connection with the tide flat problem. Since 1905 I have been the engineer and superintendent of construction for the Seattle-Lake Washington
64 Waterway Company, doing the filling of these tide-lands. The State of Washington entered into two contracts with Eugene Semple for the dredging of the East and West Waterways, under the Act of March 9th, 1893.

(At this point complainant offered and the court admitted Plaintiff's Exhibit No. 2, being copies of contracts referred to by witness.)

These contracts, Exhibit No. 2, were thereafter assigned to Seattle-Lake Washington Waterway Company which did all of the work

thereunder, and I have been engineer for that company during all the time the work has been in progress, except from 1897 to 1902, during which time there was very little work done, practically all of it being done after 1902.

Plaintiff's Exhibit No. 1 shows a pier head line in the East Waterway 250 feet from the bulkhead or property line. There is, among the original records in the local United States War Office, Engineer's Department, a similar plat showing the same lines and the East Waterway laid out in the same manner with the pier head line 250 feet from the property line, and having upon it an endorsement that the pier head line was approved by the War Department, November 17th, 1894, and a later endorsement that on June 18th, 1914, the pier head line was drawn in to 125 feet instead of 250 feet as formerly approved, and according to that record the 125-foot line would be the established government pier head line as it now exists.

(Complainant at this time, there being no objection, offers and the court receives in evidence Plaintiff's Exhibit 3.)

Exhibit 3 is the index sheet of plats covering the tide-lands as filed in King County. Plaintiff's Exhibit No. 1 shows two or three of these plats put together in one map, but it was impossible to put them all together in one map, so each was divided into a number of
65 sheets, and this general map was made as showing just what territory each of these plats that were filed covered.

At the request of counsel for complainant the witness read from the map the endorsement thereon as follows:

"Volume Two Seattle Tide Lands as surveyed and platted by the Board of Appraisers of tide and shore lands for King County, Washington, 1894-1895. Scale 100 ft. = 1 in. Appraisers Fred W. Sparling, Thos. W. Prosch, D. A. McKenzie. Edward Wheeler, Secretary. M. Stixrud, C. E., Engineer."

Now, there is another note on the margin of the plat, which says:

"We, the undersigned, appraisers of tide and shore lands for King County, Washington, hereby certify that the plats numbered 26 to 56 inclusive in this volume, are of lots, blocks, tracts, alleys, streets, avenues, boulevards, etc., on tide lands of the first class examined, surveyed and platted by us within, in front of and within two miles of the city of Seattle, under Act of the State Legislature approved March 26th, 1890. Fred M. Sparling, D. A. McKenzie, Thos. W. Prosch."

This represents the general scheme of the plat of Seattle Tide Lands, as adopted by the State Land Commissioner. Exhibit No. 3 shows both harbor lines and pierhead lines. There was a dotted line shown here within the waterway area. The harbor lines are shown out in front. The harbor area is the 600 feet that lies between what is called the uplands and deep water. It is an area that is too shallow as a rule to navigate and too deep to wade, so that the government established this line, the pierhead line or outer harbor line, as the line beyond which no structure shall extend into the water.

The East Waterway, as I understand it, only extends to the inner harbor line. The area out beyond that is this fairway and is not private property. The outer harbor line, as shown on Plaintiff's Exhibit 1, outside of the boundaries of the waterway extended, is shown on Plaintiff's Exhibit 3. It is the upper line, just at the northwest corner of sheet 48 and extends southwesterly across the plat
66 of 48 to the easterly margin of the West Waterway, and the harbor area would lie between that line and the inner line or inner harbor line as shown on the same plat. Block 48 is simply one sheet of the atlas and extends away out beyond the outer harbor line, but that does not mean that there is any land out there; it is just simply a continuation of the sheet. The fill on block 48 extends to the inner harbor line, and the same is true of blocks 42 and 52. The harbor line was not established at this time beyond about the center of that sheet in block 52. From there on there was no harbor line established. In the east waterway there are shown pierhead lines, originally 250 feet distant from the shore line, and subsequently drawn back to 125 feet from the shore line, but this extends only up to block 45. The extension of the East Waterway from the northern end of block 45 to the junction with the extension of the West Waterway shows no pierhead lines of any kind. On this plat the Canal Waterway, extending eastward from a point just north of blocks 45 and 37—the plat shows no harbor lines nor pierhead lines. The width of the Canal Waterway is 300 feet. The width of the upper end of the East Waterway from block 45 to the junction of the West Waterway is 400 feet, and neither of those show any pierhead lines or harbor lines.

(At this point complainant offers and the court receives in evidence without objection Plaintiff's Exhibit 4.)

Plaintiff's Exhibit 4 is what is known as Seattle Quadrangle Topographical maps, gotten out by the United States Government. It shows the lines, elevations, streams, lakes, waterways, etc. This is the edition of 1897, reprinted July, 1912.

I have marked upon Exhibit 4, at the mouth of the Duwamish River, a certain area that shows as water, with a red line about it. That represents the area covered by the four contracts of
67 the Seattle-Lake Washington Waterway Company. Those contracts were contracts between the Waterway Company and the State for a filling of the area shown or enclosed in the red lines on this print. The area included within the red lines represents substantially the present plat of the Seattle Tide Lands, and represents the area that was filled in under the four contracts between the State and the Seattle-Lake Washington Waterway Company. Prior to the time the waterways were dredged and the fill made, that was all water at high tide. The East and West Waterways, as shown on this map, divide the area into approximately three parallel strips, one strip, a little more than one-third, lying to the east of our East Waterway, then coming the East Waterway, then approximately a little less than a third lying between the East and West Waterways, then the West Waterway, then the remaining tide lands to the west of the West Waterway; so that it would divide that area shown in

red on that map, approximately into three equal divisions of land, the East and West Waterways occupying two-fifths, as you might express, or two-fifths plus, of the area. The circular area marked in red on Plaintiff's Exhibit 4 was the mouth of the Duwamish River before any improvement was made, which river is shown on the map as a curving stream. Duwamish River, when I came to Seattle, was considered and recognized by the Government as a navigable body of water. There were three channels of the old Duwamish River. The most easterly channel followed along the foot of Beacon Hill, in front of the Bay View Brewery, came north to near the present site of the Northern Pacific and Great Northern Depot, then swung south out into the open water. The second channel came between two of the islands there, in just about where the East Waterway now strikes Spokane Avenue, then flowed northwesterly and out
68 into the open water. The third channel, or the most westerly, flowed along the foot of the hill at West Seattle, known as Pigeon Point, and flowed along very closely and entered the open water not very far from what is now the Novelty Mills, I think, land that is owned by the Northern Pacific Railroad Company, and flowed out into open water there. This last channel was the one that was most generally used by boats going up and down the Duwamish River. In fact, it is the only channel that I ever remember being used by craft of any size going up and down the Duwamish.

The improvement made by the excavation of the waterways substituted what might be called a two-tined fork for a three-tined fork. Thereafter Waterway District No. 1 was created under an act of the State and the Duwamish River straightened and deepened as far as The Meadows, I think a matter of two miles and a half, maybe three.

The lands colored red on the plat are tide lands of Seattle, the greater part of which, if not all were covered at high tide and exposed at low tide. The Duwamish River had a small outlet flowing around to the east, which was not navigable after I came to Seattle. I understood that boats at times went up there, but I never saw it; in fact it was impossible at that time—the only filling that had been done by the Waterway Company was done there in that block. That is all filled land now, and there is no channel at all.

There was a second outlet somewhere near the center of the tide lands, which was not navigable, either, at the time I knew it, and in its natural condition was not navigable water.

The upper or south end of the East Waterway was very nearly the middle line of the fork, as the river formerly existed. Then the channel ran diagonally across what is now Harbor Island,
69 and entered the open channel to the west at the north end of the West Waterway at the present time. The south end of the channel in the width of a thousand feet, up to the Sound, does not correspond with the old channel. When I speak of the Duwamish being a navigable stream in the early days, I refer to the westerly outlet which does not correspond at all closely with the West Waterway. This ground is all filled now, except the two waterways, and all the old channels have been done away with and the East and West Waterways are substituted therefor as mouths of the Duwamish. The East Waterway is not now opened fully through. The Spokane

Avenue bridge has prevented the excavation of the East Waterway through to a connection with the West Waterway to the south of Spokane Avenue. The West Waterway is opened up for traffic clear through to the Duwamish proper. Some of the waters of the Duwamish River came down through the East Waterway. The East Waterway is not navigable south of Spokane except for a row boat or a very small launch, but it is not for ships.

(Complainant offers Exhibit 5 in evidence and the same is admitted by the court without objection.)

Exhibit 5 represents the plat of the lands lying around and adjacent to Elliott Bay. The area shown in red is the outline of the area covered by the four contracts between the state and the Seattle-Lake Washington Waterway Company. It also shows the area in which all of our filling has been done. We have substantially—or, that is, the Waterway Company has substantially filled the area shown in red on this plat, with the exceptions that along the foot of Beacon Hill, from Massachusetts Street south to Bay View Street, there is a strip in there that was never filled, and to the west of
Twenty-sixth Avenue South, or to the west of the center line
70 of Twenty-sixth Avenue South, that has never been filled, that is, a little strip to the west of Twenty-sixth Avenue South that has not been filled, and the area over in near the foot of Beacon Hill has not been filled, and there is a south area, clear to the south end, down here south of Dakota Street, that has not been filled. The rest has all been filled up to above high water mark. With the exception of a small amount of material that was put in from regrades on Third and Fourth Avenue, the area was filled under contracts between the State and Seattle-Lake Washington Waterway Company for the dredging of the East and West Waterways. Substantially all of the material was taken from the East and West Waterways and used in filling the tide lands. The area in red on plaintiff's Exhibit 5 represents the same area as the area enclosed in the circular red line on Plaintiff's Exhibit 4. The area in red at one time was subject to the ebb and flow of the tide. The outer boundaries of the area in red, which might be called the shore line boundaries, represent the original shore line of the harbor of Seattle. That which is in white, surrounding the red lines, would represent the original uplands. The distance of that area from the east, which is the top of the map, down to the East Waterway is about 6,000 feet. From the north end to the south end it is about two miles. I am speaking now of the area that is east and north of the East Waterway. That which is west of the East Waterway is designated as Harbor Island. The length of Harbor Island from north to south is about a mile and a quarter, and it is a little more than half a mile wide across from the East to the West Waterway. The irregular strip in red on the west side of the West Waterway is a little over two miles in length, and its width in the widest part, at about West Lander Street, is something like a quarter of a mile. Its narrowest part is two or
71 three hundred feet wide. On that area in red, since it has been filled, there have been numerous industries established there. Along down First Avenue South, the Seattle Hardware Com-

pany have put up a big brick building, and along on the east side of Second Avenue South I think there is probably eight or ten three to five story wholesale business houses, machinery houses and so on. Over on this side here the railroad company has put in numerous railroad buildings, roundhouses, and so on. There have been several industries established down the east line of the East Waterway, the Hammond Milling Company and the Albers Brothers and a number of them that I don't recall at the present time, but it is quite fairly well built up at the present time. It is traversed by seven or eight or nine different streets running north and south and also by streets running east and west. The area in a general way may be considered as the area where the wholesale and terminal business of the city is largely done in, and in which is the location of the principal railroad yards and depots and all of that.

Down here on the south end, or the southwest portion of Harbor Island, have been two or three industrial developments down there, the Fisher Flour Mills, the C. H. Lilly Company, the Lion Varnish Company, and boiler works, and I think it is the Pacific Pipe & Machine Works on Spokane Avenue, and several sawmills. It is quite well started towards development of the area for industrial purposes.

In addition to the Duthie Company, the Washington Shipbuilding Company—the old Puget Sound Bridge & Dredging Company—plant is on the West Waterway. The East Waterway starts in with the Skinner & Eddy; a little south of the Skinner & Eddy is the Seattle Construction & Dry Dock Company, and then there
72 are one or two launch builders, and on the west line of the East Waterway the only shipbuilding is Duthie Company. And to the south and right in here there are one or two small yards building—they are all boats, wooden vessels; then come the Fisher Flouring Mills and those, and then on the west line—or the east line of the West Waterway comes the Washington Shipbuilding Company; then on the west line of the West Waterway comes the Ames Shipbuilding Company and the Wilson Shipyards for building wooden ships. And down here where the Seattle—the Drummond Lighterage Company plant is, there are one or two small yards in there.

The Port of Seattle has constructed a number of docks and terminals along the East Waterway. In front of the Hammond Milling Company there was a small pier or wharf projected, and prior to the construction of the defendant's wharf there was a small wharf in front of the boiler works—the Fox Boiler Works. A small portion of the area to the south of what is shown on the map in red was filled by the dredging of the Duwamish Waterway, and there was a small portion just east of that shown in red that was filled in south of Spokane Avenue from the Duwamish Waterway fill, but it is not included in the red area. The land abutting upon the East Waterway on the east has been in process of being developed for the last ten or twelve years. Prior to 1913 I think there were three industries down on the east line of the East Waterway. There was the Hammond Milling Company, the Standard Oil Company—I think Albers' Mills came in later. The San Juan Fishing & Packing Com-

pany came in, I think, around 1906 or '7, possibly 1908. The San Juan Fishing & Packing Company now extend out beyond 125 feet. I think they didn't prior to 1913. As to when the projection
73 of the buildings, shown upon the map to project beyond the 125-foot line, was made I cannot say, but prior to 1913 and prior to the passage of the Act I do not recall any pier being out as far as 125 feet. They all project beyond the shore line and are out 125 feet. They had the wharf out some distance, and as to some that was the condition prior to 1913, but not as many as shown here. That was the condition, I think, as to three or possibly four industries that were there prior to 1913. That is all that were there. There were more there of the small industries that hadn't wharfed out there.

(Plaintiff's Exhibit 6 was marked "Plaintiff's Exhibit 6" for identification.)

Plaintiff's Exhibit 6 for identification is a typical cross section of the West Waterway—the East Waterway from the property line extending into the water, say 150 feet. It shows the lines, the theoretical grades or the theoretical prism of the canal that our contract provided for being taken out, the manner in which the bulkhead was constructed, and also the present shore line, if it could be so called, in the waterway. The depth of the waterway can be calculated from that. It shows that at the pier head line, 125 feet from the shore, the depth as excavated was 26 feet, and it shallows up there so that at the shore line it would be bare at times of extreme low tide—there would be no water there. It is not in a practical way navigable.

(Plaintiff's Exhibit 6 offered and admitted in evidence without objection.)

I will explain the various lines on Exhibit 6, as follows:
Starting over on the left hand side of the map, at the line marked "Property line", that represents the property line along the margin of Harbor Island. Along that property line, the outer top corner,
74 on the property line, was built a brush bulkhead. The slope of the face of that brush bulkhead was on a slope of one-to-one, that is, as it went down one foot it projected one foot into the waterway; and that was kept down to what we call the mud elevation, that is, the original surface of the mud in the tide flats. After that was built, it extended back here to—here is 12 feet on top and probably—greater at the bottom, to impound the water and material in back of it. We started in five feet from the toe of this bulkhead with a dredge and dredged out on a slope of approximately four-to-one until we reached a depth of 30 feet in the waterway at extreme low tide; and that material was put in over back of the bulkhead. The surface of the fill, the filled ground and the top of the bulkhead there was required to be at elevation 18, that is, 18 feet above extreme low tide.

Extreme low tide is 16 feet below city datum "00". The city datum is high tide. This elevation "00" is extreme low water. That

is practically the same as the United States Coast Geodetic Survey datum. The top of the bulkhead and the top of the fill was required to be at or above extreme high water, or grade 18. We generally make those bulkheads about a foot higher than what is shown here, to carry the fill from three to six-tenths higher than grade 18. There would be about one foot above extreme high tide. The tides vary, of course, between those two extremes—between zero and eighteen. These tides, the extreme high tide and extreme low tide, would not occur probably more than once or twice a year, maybe sometimes would not occur more than once in two years; but, in the main, the average high tide would run along in about ten or eleven or seven or eight feet lower than this, bringing the average high water not quite to the top of that brush bulkhead, leaving the depth down
75 six or seven feet, and that, of course, in ebbing, it would not ebb out to this line, but would probably be a foot or two above, so that the water might stand just—instead of the water line at—being as shown by the blue, it would be nearer the property line. On a 12-foot tide, the blue would run up on the slope. It would only be about a half or two-thirds up this brush bulkhead slope. Of course, the mud flat varied. It was not always just 13 feet below the grade 18. It might be plus five, as shown here, and it might be possibly zero, so that mud flat would vary from around minus 5 up to sometimes possibly plus 5 or 6. The distance between the bulkhead or property line out to the point where the blue commences, which point is the point of extreme low tide, is about 36 feet. The most land or shore that would ever be uncovered by the ebb of the tide would be a distance of 36 feet from the property line. Everything outside of that 36 feet would be covered by water at all times, and the 36-foot line would be what is generally termed the low water mark.

Assuming that the owner of the abutting property had a right to extend out to navigable waters, practically serviceable in an ordinary commercial way for serving this property with vessels, he would have to have a depth of 25 or 30 feet. If he went out 125 feet he would get 26 feet at all times. You can calculate the depth of water at any point by measuring from extreme low tide or extreme high tide out on the slope. In the condition the canal is in at the present time you could not get a depth of from 25 to 30 feet of water uniformly short of about 125 feet out from the shore line. I think that at mean low tide the chances are that you would probably have a few feet outside of the bulkhead, exposed, depending upon the elevation of the mud flats. The mean low tide is probably two or two
76 and a half feet above this, and if that was projected back it would strike in this particular case about seven and a half feet from the toe of the slope. It varies at different points along the canal. By "toe of slope" I mean the toe of the bulkhead slope. The toe of the bulkhead slope is always exposed at mean low tide. The toe of the slope extends from the property line a distance equal to the height of the bulkhead, so that the distance between the property line and the toe of the bulkhead would be about ten feet, the slope being a one-to-one. There would always be a distance of ten feet

between what would be high water mark and mean low water mark, even on a mean low tide, exposed,—the thickness of the bulkhead.

(Complainant asks to have a sketch marked for identification, and the same is marked Exhibit 7 for Identification.)

Exhibit 7 for Identification is practically the same as Exhibit 6. The red line from the point marked "bulkhead line" down to the first break, where the red line and the blue line join, represents the face of the bulkhead, one-to-one slope. And then from that point where the blue and red lines join, the red line comes on down on the theoretical boundary of the prism of the canal that we had to excavate, and goes down on a four-to-one slope, reaching the full 30 feet out and beyond—at extreme low tide reaching a full 30 feet out and beyond the 125-foot pierhead line as now established. This map shows that at the pierhead line there is an average of 27 feet of water at extreme low tide. The map shows that at extreme low tide it would strike the foot of the slope of the bulkhead. The map is platted on cross section paper. Each one of the little squares represents a foot, and each one of the larger squares ten feet.

77 From the map by counting the squares down from the low tide line you can say what the depth of the water is at any point. Where this is marked "2'" between the blue line of extreme low tide and the sloping red line would be two feet. There is another place where it is marked 11 feet, and a little further out 16 feet and 21 feet and 27 feet, so that beginning at zero it runs out to 11, 16, 21, 27 and 30 feet, as marked on this map. At extreme high tide you would add 18 feet. At high tide where the map is marked two feet there would be 20 feet at a point 25 feet from the property line. At a point 62½ feet from the shore you would have a depth of 29 feet at high tide and 11 feet at low tide. At 80 feet from the shore you would have 16 feet at low tide and 34 feet at high tide, At 100 feet from shore you would have 21 at low tide and 39 at high tide. At the pier head line you would have 27 feet at low tide and 45 feet at high tide. I am speaking of extreme high tide and extreme low tide. There is an ebb and flood tide in the East Waterway at all times, and always will be.

(Plaintiff's Exhibit 7 is received in evidence, and marked "Plaintiff's Exhibit 7.")

78 *Testimony of George F. Nicholson, Witness for Complainant.*

I am and have been for twelve years a civil engineer by profession. am now chief engineer for the Port of Seattle Commission, and ave been employed by the Port of Seattle since the organization of he engineering department about five and a half years ago, and have een chief engineer for the Port approximately two years. During he five years and a half I have had a good deal to do with the conruction and development of the Port's properties, preparing their lans and superintending the construction work, and have had ocsion to specialize more or less on dock properties, Port properties, aterways, etc.

Some time ago at the request of the Port Commission I made a series of maps and plats, showing all the development on the water front of Seattle of every kind. They were made in connection with certain plans for the improvement of the harbor that were under way by the Chamber of Commerce. I made a map showing all of the structures and industries on the East and West Waterways.

(Complainant asked to have a map marked for identification, and the same is marked "Exhibit 9 for Identification.")

Exhibit 9 for identification is a copy of the map just referred to.

(Plaintiff's Exhibit 9 for Identification is offered and received in evidence, and marked "Plaintiff's Exhibit 9.")

This map was completed about February 1st, 1918, and shows the existing structures and industries of every kind on the East and West Waterways as of that date. Looking at the map and starting
79 at West Massachusetts Street on the corner of the East Waterway—that is, the northeast corner of the East Waterway—beginning at the northeast corner of the East Waterway the first industry is the Albers Brothers' Milling Company, then the Hammond Milling Company just south of them, and across Railroad Avenue we have the Standard Oil Company, and also the Nilson & Kelez Shipbuilding Company, on the Standard Oil property, just to the south of the Standard Oil. Then we have the Stacy Street Terminal of the Port Commission, and the Chicago, Milwaukee & St. Paul Railroad Company's dock, and then we have the Pacific Construction & Engineering Company, who have a plant facing on Whatcom Avenue. The latter is a forging plant where they forge castings in connection with the shipbuilding industry. South of them is the Port Commission Hanford Street Terminal, and across the turning basin the Spokane Street Terminal of the Port Commission, and the Elliott Bay Mill Company is just south of the Port Commission property. The Albers Brothers' plant is a flouring mill. Also I see that I have overlooked the San Juan Fishing & Packing Company plant and the Commercial Boiler Works. All these plants are marked on the map. This takes up to the end of the portion of the East Waterway which is a thousand feet wide. Crossing to the west side of the East Waterway onto the east shore of Harbor Island, opposite the Port of Seattle docks at Hanford Street, and going north we have the J. F. Duthie Shipbuilding plant in litigation here, being the property leased from the O. & W. Railroad Company that is in litigation. The Duthie Shipbuilding plant ha*ve* constructed ways which extend out in the waterway area, the 125-foot strip. Those boat-like looking drawings represent four ways which extend partly out past the property line. North of the Duthie Shipbuilding plant
80 the East Waterway Dock & Warehouse Company are constructing a dock, also *also* warehouse and oil tanks to the rear of the dock, and just to the north of them Swift & Company, I believe, are constructing or have constructed oil tanks on this block, and contemplate a wharf structure on the water front. That is practically all the plants on the west side of the East Waterway. Swift

& Company are on the Oregon & Washington property too. They have some steel tanks in the rear, in about that location. East Waterway Dock & Warehouse Company, also known as Rogers Brown & Company, are constructing a wharf. It extends out to the pierhead or outer harbor line and parallels the water front. Also they are constructing a warehouse to the rear of that wharf. They are engaged in general commerce, particularly the oil business. Their plant is more especially constructed for taking care of the oil traffic, although they intend to take care of general commodities also. They are at present specializing in handling large quantities of oils from the Orient. There is now pending a lease between Rogers Brown & Company and the Port of Seattle for the use of this waterway area in front of their property, and at the meeting of the Port Commission a week ago action was taken that the permits would be issued to Rogers Brown & Company for this area and the rental put in escrow awaiting the decision of this case. An additional area has been rented to Duthie & Company by the Oregon & Washington Railroad Company, and the permit is pending with them, depending on this same litigation, and the same is true of Swift & Company. Swift & Company have constructed some steel tanks for storage of oil, and I understand that they contemplate construction of a wharf in connection with that.

81 Direct examination:

Testimony of R. C. Erskine, Witness for Complainant.

I am now and have been for sixteen years and a half engaged as a real estate broker in the City of Seattle, doing a general real estate, loan, insurance and appraisal business. I am familiar with the filled-in tide flats of the City of Seattle. I have dealt quite extensively in industrial properties, both as the owner's agent and the buyer's agent, and have acted as appraiser many times. I have been selling sites and arranging for the construction of buildings for sale and lease for factory purposes, devoting most of my time personally to that work. I represented Frank Waterhouse & Company, the purchasers of certain property across the West Waterway from Harbor Island, being Block 430, Seattle Tide Lands, at the corner of the Waterway fronting on Elliott Bay and on the Waterway, and in connection with that purchase I looked into all the conditions that I could learn about regarding all property which might possibly answer their purpose. I have studied all the maps I could find about the topographical situation in the East and West Waterways and have inspected the ground. I am more or less familiar with the situation as to the construction of the Waterways, as shown by Exhibits 6 and 7, and I have looked at similar maps before, though I didn't have the exact grades of slopes as I see them on these exhibits. Assuming that the grades of slope are correct as to the construction of that waterway, and that the abutting property owner on a waterway had no right to wharf out or to occupy for any industrial purpose any of the area between

high water line and the pier head line, shown on that map, for 125 feet deep from the property or bulkhead line, the effect on the value of any piece of upland property by a state statute which gave the upland owner a preference right to a thirty-year permit or
82 lease of the area 125 feet wide extending out into the water the whole length of his property would be to greatly enchance the value of the property. In making this statement I am taking into consideration the conditions shown by the topographical map. It is impossible to land a boat against the property line without wharfing out, and if you dug down you would undermine the property.

Assuming that under the provisions of Chapter 168 of the Laws of 1913 of this state, a preference right to a 3 year permit of the area just described is granted to an upland owner at a rental of two per cent of the assessed valuation of an equal area of upland, in accordance with the assessment for the year preceding the issuance of the permit, if we should assume that the waterway area had actually an equal value with the same area of owned land adjoining, it would seem that the rental charge would be from a fourth to a sixth of the ordinary rental, because the charge for leaseholds of ground is from four to six per cent of the value of the ground, and this charge is practicaly one per cent, because it is two per cent of the assessed valuation, which is ordinarily about half—apt to be more under than over half of the actual value of the land; so it would appear to be a nominal rental. That is assuming that the area—the water area is equal to the value of the land area, and for many purposes it is more valuable, being the controlling factor. It is a difficult thing to compare the value of the Waterway area with the value of the adjoining upland. The value would depend on the exact situation of the land in question and the uses to which it was to be put, but roughly speaking there is a very great difference in the value of the two. I regard the rental above referred to as a nominal rental.

83 At this point in the testimony of witness, the following occurred:

"Q. (by Mr. France, counsel for complainant). State whether or not it is a fact that under the custom of leasing of property, where the lease is for a long term of years, say thirty years, and the rental is based upon the leasehold value, if a rental for the whole 30 year period is ever fixed at the beginning of the period?

Mr. Bogle: I do not think that is material here.
The Court: I do not see the materiality.

Mr. France: The materiality is this, if Your Honor please: I am trying to show that this rental is merely a nominal rental, and it is based upon the theory of a license, rather than a return upon the value of the property; and I think it is a very controlling circumstance to show that if the state were dealing with this as a leasehold interest, in which it was seeking to get a return upon the

value of the property, it would provide for re-appraisals at definite periods, which is true of every lease; and, while that may be a matter that the court should take judicial knowledge of, I think it is a proper question to go to show the intention of the Legislature in fixing this merely as a license fee during the whole period of thirty years, rather than as a rental upon the value of the property.

The Court: Sustained.
Mr. France: I would like to note an exception.
The Court: Oh, yes."

Cross-examination.

One of the principal values, or of the chief elements of value of lots abutting upon this Waterway consists of its accessibility to the navigable waters, or the Waterway, and, through the waterway, to the navigable waters of Elliott Bay, and if it was shut off from that accessibility the percentage of value of the lots that would be taken away would vary with the lots in question. Taking the lots on the west side of the East Waterway I can make an approximation only, but it would be about half the value. In stating on direct examination that I considered the rental of two per cent
84 upon the accessed valuation of an equal area of the abutting property to be a nominal rental, I am taking into account the fact that the rental remained fixed for the thirty years and that it is two per cent, not on the value, but on the assessed value. That is a nominal rental. I regard the rental of $1,728.96 for three years for the use of this waterway area between the pierhead line and the shore in front of Lots 6 to 15, inclusive, of Block 393, Seattle Tide Lands, nine lots, considering the value of the property and what is given, as nominal rental. If I had sufficient use to have the upland property, I think that would be just an incident in the matter. When I was looking for property for Frank Waterhouse & Company I considered leasing one piece of property on the west side of the East Waterway, but I do not think that the Port's claim of rights in that area was discussed with me or that point raised. If so, I do not recall it. Assuming that the Act of 1913, which I have referred to, provides that if the owner of the abutting property did not make application to lease the waterway area within ninety days from the time of the passage of the Act the Port should have the power to grant or lease the waterway area to any one else it saw fit, if the property was vacant in 1913, and no use for it, and no one paying rental on it, that condition of things would have an effect on the value of the property. If the owner does not lease it he takes a chance of having somebody else lease it, in which case there would be a strip 125 feet in depth for the whole width of his lot interposed between him and deep water belonging to somebody else, and his land would become interior land so far as practical use went. I think water frontage in that position is worth twice as much as interior land back of it.

85 Redirect examination.

In my testimony last given, I am considering actual water frontage with whatever is necessary to get out on the water and use the water for navigation purposes. If there were no rights out in the water—no rights at all beyond the property line—it would always have been then interior land for practical use.

Recross-examination.

If the terms of the lease provided that this rental should cover only so much of the 30-year term as intervened between September 1st, 1913, and January 1st, 1929, and rental after December 31st, 1928, should be fixed at such sum as the Port Commission, or whatever body at that time had control of it, saw fit to fix it at, that would be a material matter in affecting the value of the property. I do not think that the fact that the right asserted by the Port includes the right to determine what kind of structures are to be constructed, what kind of material is to be used and the form of the structure, would diminish the value of the property in the hands of the owner. I think the public policy would dictate there, and, unless they had an absolutely vindictive and unreasonable Port Commission, they would permit anything that was a suitable improvement and a man could rely on that. I think that would be like building regulations in the city. The building regulations only prescribe fireproof material. It does not go beyond and dictate anything beyond that. In each building district there are certain things allowed, and you can build so many stories of one kind and so many stories of another kind, and, if there is a hall, then there must
86 not be such and such under it, and there must be so many stairways, so broad, and very many other things, but they are usually in the interest, eventually, of the man who improves the property, and I do not think adversely would affect the value of the property.

Re-redirect examination:

According to my experience, under the custom of leasing property where the lease is for a term of years, say, 30 years, and the rental is based upon the lease-hold value, the rental is sometimes fixed—determined for the whole period, but not fixed at the same rate; that is, it is stepped up. If it is not fixed by stepping up, the customary manner is to fix it by re-appraisement. It would be unusual to fix the rent for as long a period as fifteen years without a change in the rental. Ten years is as long as I have ever known it to be so fixed.

Re-recross-examination:

There are very many leases where the tenant puts up his own structures, and where they are long-term leases, but usually the rental is changed either by an original agreement or by appraisals

throughout the term. They have varying periods about that. It is a matter of agreement between different individuals. I do not happen to know of any where the period has run over ten years.

87 Redirect examination:

Referring to plaintiff's Exhibit 9, in front of Block 430 and Block 404, and blocks E, F, G, and H in block 396, of Seattle Tide Lands, all of which face on Elliott Bay, and in front of all of which there is harbor area, assuming that some fifteen years ago the rentals on those harbor areas were fixed exactly on the same basis by statute, that in front of Block 430 the rental is $37.96, in front of Block 404 the rental is $31.83, in front of Block E and part of Block F the rental is $18.60, and in front of Blocks F and G the rental is $14.50, and in front of Lot 1, Block G, $7.09, and in front of Lot 2, Block H, $7.08, and infront of Lot 1, Block H, $4.43, and that that rental fixed fifteen years ago was based on two per cent valuation of an equal area of adjoining upland, that certainly is at this date a nominal rental.

Testimony of George F. Nicholson (Recalled).

On the east side of the West Waterway, starting at the northeast corner, and running down the waterway, between West Lander Street and West Hanford we have the Washington Shipbuilding Corporation, or the Puget Sound Bridge & Dredging Company, and on the north side of West Hanford Street the Standard Boiler Works are located. They are engaged in the making of boilers. On the south side of West Hanford Street is the Lilly & Company plant, flour and feed mill, and also the Fisher Flouring Mill Company. On the west side of the West Waterway is located the Alaska-Pacific Shipbuilding Company, at the head of the Waterway, the Drummond Lighterage Company and the Ames Shipbuilding plant. The Drummond Lighterage Company are engaged
88 chiefly in the oil business; that is, the storage of oils, vegetable oil and fish oil. To the north of the Drummond Lighterage Company is located the Ames Shipbuilding Company. North of that, running out to the end, there are no improvements. Ninety-five per cent of the industries along these two waterways have taken out permits from the Port of Seattle. Every one on the East Waterway has taken out permits but the Oregon & Washington and the Alaska Steamship Company, but they have no improvements on their property.

There was a hearing before the War Department with respect to drawing back the pierhead line from 250 to 150 feet. The result of that hearing is incorporated in the Port leases to the property owners on the East Waterway. As I remember it, it was a hearing before the War Department in which all the property owners were entitled to appear, and the Port Commission was entitled to appear and took part in that hearing. The Port Commission has no record of that hearing, but we have a record of that matter incorporated in

our leases, and the substance of it is that upon the consent of the property owners and the Port Commission, the War Department changed its pierhead from 250 to 125 feet, except that as to these industries who had previously constructed their wharves beyond the 125 foot line, they were to be permitted to retain the structure in its then condition for a definite period in the future, ten years, I think. I did not attend the hearing, and I could not say, but that is the way I understand it. The only information I had was what is incorporated in our leases.

(At this point Plaintiff's Exhibit 8 is marked for identification.)

89 Plaintiff offers Exhibit No. 8 for identification in evidence, and the Court says: "It may be filed, and I will determine when I finally decide the case whether it is material."

Mr. Bogle: Mr. France and I have stipulated that this document, which has been marked Plaintiff's Exhibit "10," embodies the conditions which the Port Commission is exacting for the permit or lease of lots 10 to 16 in Block 394, to the East Waterway Dock & Warehouse Company, referred heretofore as Rogers Brown & Company, tenants of the Railroad Company. That is introduced merely to show what the practical condition that they are putting up to the landlord and his tenants is.

Now, I suppose the conditions in regard to the Swift & Company property are of like character.

Mr. France: That is the standard form of permit that the Port Commission has adopted for all waterway area permits on the East and West Waterways, and embodies a provision that the back rental from September 1st, 1913, up to the date of the execution of the permit, shall be charged. That is one of the things that is objected to, and that is the purpose largely of its introduction."

Plaintiff's Exhibit 11 is marked for identification, and witness testifies:

This is one of the plans that was requested to be furnished with the permit for waterway area, and shows the general layout and construction of the improvements in the waterway area, by J. F. Duthie & Company. The Port has a formal application that is filled out before a permit is issued.

(Plaintiff's Exhibit 12 is marked for identification).

Plaintiff's Exhibit 12 for identification is the printed form of application that all applicants for permits in the waterway area are required to sign and fill out. The defendant, J. F. Duthie & Company, in getting the permit in question here, made such an application. That has been the standard form of application since the permits have been issued, shortly after September 1st, 1913.

(It is stipulated between counsel for complainant and defendants that a full copy of the original application (Duthie applica-
90 tion shall be introduced so that the whole thing will show in the record.)

At the time the application was made, Duthie & Company submitted this plan for improvements, marked Plaintiff's Exhibit 11 for identification, and there was another detail on another map, marked "8," in connection with that.

(The printed form of application, heretofore referred to, for which a full copy of the Duthie application is to be substituted, was received in evidence and marked "Plaintiff's Exhibit 12".)
(Plat "A" and plan "B," above referred to, were received in evidence, same being attached together and marked "Plaintiff's Exhibit 11.")

The permit that was issued to J. F. Duthie & Company, that is attached to the complaint as an exhibit here, was issued approving of these plans "A" and "B" on plaintiff's Exhibit 11 and accepting the application, being plaintiff's Exhibit 12, and those are the structures which Duthie & Company subsequently built under this application. I have, as engineer of the Port of Seattle, had occasion to pass upon a number of permits for shipyards—some six or seven different shipyards—that have been constructed in the East and West Waterways, and have studied the plans of the improvements of all of these shipyards that have been constructed on the East and West Waterways in passing upon their applications. I do not think it would have been possible for J. F. Duthie & Company, or any of these other shipyards, to have constructed shipyard plants without having the right to build ways and structures out into the waterway area.

91 Cross-examination:

The Port has never adopted any standard forms of construction which it would require on the East Waterway. They only approve the plans which are submitted with the application. The structure has to be sufficient to sustain certain loads. The plans are approved by the Port Commission in conjunction with the City Building Department. The Port has never adopted any standard rules as to the material to be used in these structures, or the carrying capacity, or in any other respect. That would be rather impossible, because there may be some improvements put up for light commodities, and other structures for heavy commodities, and it would be rather hard to adopt a uniform rule. The Port requires a party who wants to improve in front of his abutting property to submit to the Port the plans of the improvement proposed, and the Port either accepts or rejects them. These Duthie plans were approved, and constructed in accordance with the plans.

Albers Milling Company owns the first structure on the east side of the East Waterway, next to Massachusetts Street. I do not

remember when that was put there. I am sure it was prior to 1913. The structure extended out to pierhead line. The structure next to it is owned by Hammond Milling Company, and was built prior to 1913, and extended out to the 125-foot pierhead line. The San Juan Fishing & Packing Company has a plant there that was constructed prior to 1913, and it extended out beyond the 125-foot line. The Commercial Boiler Works has a structure there that extends out to the pierhead line and was built prior to 1913. Some of the structures shown on this plat extend beyond the 125-foot line. They all extend beyond what is called the property
92 line. It is a wharfing out with all of them. All of them that were in existence prior to 1913 had wharfed out for such distance as they saw fit. Some of those improvements run back considerably before 1913. I could not say just what years. The majority of the improvements that were put on the lots adjoining the East Waterway prior to 1913 wharfed out for a greater or less distance beyond the property line and into the area between that line and the pierhead line.

(By stipulation, complainant at this point offers in evidence and reads into the evidence two deeds, being original deeds from the State of the tide-lands involved in this cause to defendant Oregon & Washington Railroad Company's predecessors in title, as follows:

Deed.

"Auditor's Number 303369.

STATE OF WASHINGTON

to

GEORGE S. McLAREN.

Consideration $1,503.
Dated July 7, 1904.
Filed for record July 12, 1904, and recorded in Volume — of Deeds, page —.

First party does hereby grant, bargain, sell and convey unto the second party, and to his heirs and assigns, the following described tide lands of the first class, situate in front of the City of Seattle, King County Washington, to-wit:

Lots one to nine, inclusive, block 393, as shown on the official map of Seattle Tide Lands, filed with the Board of State Land Commissioners at Olympia, Washington, March 15, 1895.

Subject, however, to any lien or liens that may arise or be created in consequence of an act of the Legislature of the State of Washington, entitled 'An Act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the state,

granting rights of way across lands belonging to the state,' approved March 9, 1893.

Witness the seal of state affixed.

HENRY McBRIDE,
Governor.

Attest:

SAM H. NICHOLS,
Secretary of State.

State Record of Tide Land Deeds. Volume 5, page 210."

83

Deed.

"File No. 370,709.

STATE OF WASHINGTON

to

V. HUGO SMITH.

Dated December 26, 1905.
Consideration $976.00.
Recorded Jan. 9, 1906, Vol —, Deeds, page —.

First party does hereby grant, bargain, sell and convey unto second party, his heirs and assigns, the following described tide land of the first class, situate in front of the City of Seattle, in King County, Washington, to-wit:

Lots 10, 11, 12, 13, 14 and 15, Block 393, as shown on the official map of Seattle Tide Lands filed with the Board of State Land Commissioners at Olympia, Washington, on March 15, 1895.

Subject, however, to any lien or liens that may arise or be created in consequence of or pursuant to the provisions of an act of the Legislature of the State of Washington, entitled 'An Act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the state, granting rights of way across lands belonging to the state.' Approved March 9, 1893.

To have and to hold the said premises, with their appurtenances, unto second party, his heirs and assigns, forever.

Witness the seal of the state.

[STATE SEAL.]

ALBERT E. MEAD,
Governor.

Attest:

BEN S. FISH,
Asst. Secretary of State.

State Record of Tide Land Deeds, Vol. 7, page 228."

84 It is stipulated and agreed by and between counsel for the Port of Seattle and the Oregon & Washington Railroad Com-

pany, for the purposes of this action, that the title of the Oregon & Washington Railroad Company to the tide lands involved herein is deraigned as follows:

Decree of the Superior Court of the State of Washington for King County in cause No. 23172, dated January 23, 1899, awarding to George Kinnear, William R. Braley and D. C. Brawley the preference right to purchase lots 1 to 9, inclusive, Block 393, Seattle Tide Lands, according to the plat thereof as surveyed and platted by the Board of Appraisers of Tide and Shore lands for King County, recorded in the office of the auditor of said county on February 11, 1895; which decree likewise confirmed in The Indemnity Trust Co., the preference right to purchase lots 10 to 15 and part of lot 16, Block 393, Seattle Tide Lands according to said plat, the Elliott Bay Tide Land Company the preference right to purchase parts of lots 17, 18, 19 and 20, Block 393, Seattle Tide Lands according to said plat, and in the Allen & Nelson Land Co. the preference right to purchase the balance of said lots 17, 18, 19 and 20, Block 393, Seattle Tide Lands, and a part of lot 16, Block 393, Seattle Tide Lands, according to said plat.

Tide land deed of the State of Washington, dated July 7, 1904, and recorded in the office of the auditor of King County, July 12, 1904, granting and conveying to George S. McLaren lots 1 to 9 inclusive, Block 393, Seattle Tide Lands, to whom the interest of George Kinnear, William R. Brawley and D. C. Brawley has passed by mesne conveyances; also Tide-Land deed of the State of Washington, dated December 20, 1905, and recorded in said office on January 9, 1906, granting and conveying to V. Hugo Smith lots 10 to 15 inclusive, Block 393, Seattle Tide Lands, also Tide-Land deed
95 of the State of Washington, dated August 4, 1902, and recorded in said office August 8, 1902, granting and conveying to Hortense Amalie Smith part of lot 16, Block 393, Seattle Tide Lands; also Tide-Land deed of the State of Washington, dated June 20, 1900, and recorded in said office June 27, 1900, granting and conveying to the Allen & Nelson Land Co. the Balance of lot 16, Block 393, Seattle Tide Lands, and parts of lots 17 to 20, inclusive, Block 393, Seattle Tide Lands upon completion of its contract for the purchase of the same; and also Tide-Land deed of the State of Washington, dated August 9, 1902, and recorded in said office September 11, 1902, granting and conveying to the Elliott Bay Tide Land Co. the balance of lots 17 to 20 inclusive Block 393, Seattle Tide Lands upon completion of its contract for the purchase of the same.

Deed of the aforesaid George S. McLaren and his wife, dated July 13, 1904, and recorded November 28, 1905, conveying lots 1 to 9 inclusive, Block 393, Seattle Tide Lands, to the Northwestern Securities Company; and deed by said company, dated November 27, 1905, and recorded November 28, 1905, conveying said lots to V. Hugo Smith and Clarence S. Preston; and deed by them dated January 25, 1906, and recorded February 7, 1906, conveying said lots to Joseph Hellen.

Deed of the aforesaid V. Hugo Smith, dated January 23, 1906, and recorded February 8, 1906, conveying lots 10 to 15, inclusive, Block 393, Seattle Tide Lands, to Joseph Hellen.

Deeds of the aforesaid Allen & Nelson Land Co. and Elliott Bay Tide Land Company, dated September 8, 1902, and recorded September 11, 1902, conveying to J. D. Houghton the whole of lots 17 to 20 inclusive, and part of lots 16, Block 393, Seattle Tide Lands; and deed, dated January 30, 1906, and recorded February 6,
95 1906, conveying said lots and said part of lot 16, to Joseph Hellen.

Deed of the aforesaid Joseph Hellen and his wife, dated March 1, 1906, and recorded March 23, 1906, conveying lots 1 to 20, inclusive, Block 393, Seattle Tide Lands, to the Washington Northern R. Co.; and deed of Hortense Amalie Smith, dated April 25, 1906, and recorded April 27, 1906, conveying part of lot 16, Block 393, Seattle Tide Lands to Henry Broderick; and deed of Henry Broderick, dated and recorded on the same days respectively, conveying said part of lot 16 to the Washington Northern R. Co.

Deed of the Washington Northern R. Co., dated May 25, 1906, and recorded June 5, 1906, confirmed by deed dated July 24, 1906, and recorded July 24, 1906, conveying the aforesaid lots 1 to 20 inclusive, Block 393, Seattle Tide Lands to the Oregon & Washington Railroad Company.

97 It is stipulated between counsel for complainant and defendant Oregon & Washington Railroad Company that the conveyances made to Joseph Hellen were for the defendant Railroad Company, for whom the purchase was made by Hellen and that the amounts paid by said defendant through Hellen for the various lots, including the lots involved in this cause, Lots 6 to 15 in Block 393, Seattle Tidelands, was as follows:

Lots 1 to 9, $136,350.
Lots 10 to 15, $90,900.
Part of lot 16, $15,360.
Part of lot 16, all of 17 to 20 inclusive, $45,450.
Making a total purchase price of $288,060.

It is further stipulated that in addition to said purchase prices the defendant Railroad Company has paid assessments for filling the lots as follows:

Lots 1 to 3, $16,976.56.
Lots 4 to 6, $16,731.29.
Lots 7 to 15, $48,934.27.
Lots 16 to 20, $15,736.99.

The total of these assessment liens for filling the lots amounting to $98,379.11. So that the property has cost the defendant company, in the purchase price and filling expenses, $386,439.11.

98 Plaintiffs' Exhibit 2 consists of a contract and supplement thereto, both dated October 27th, 1894, between the State of Washington and Eugene Semple for the excavation of Lake Washington Canal and East Waterways and the filling of Seattle Tidelands under the terms of Chapter 99 of the Laws of Washington of 1893, and an assignment of said contract to Seattle and Lake Washington Waterway Company of the same date; also a contract and supplement thereto between the same parties under the same Act for

the excavation of West Waterway and filling of tidelands, also assigned to said Seattle and Lake Washington Waterway Company.

99 Plaintiffs' Exhibit 8 is as follows:

Resolution No. 142.

A Resolution of the Port Commission of the Port of Seattle Establishing the Fairway in the East Waterway.

Be it resolved by the Port Commission of the Port of Seattle as follows:

Section 1. The pier head lines indicated on the official map of the harbor of Seattle in the East Waterway at a distance from the shore line of 250 feet were so indicated at a time when the future needs of navigation and commerce of the Port of Seattle were necessarily problematical and uncertain; and the intervening lapse of time has produced a better knowledge of the subject, this being especially true since the organization of the Port District of the Port of Seattle and its recent adoption of a comprehensive scheme for the improvement of the port, and its initiation of a policy of public ownership and operation of harbor facilities, and recent development in ship construction and the opening of the Panama Canal within the next few months will soon bring into the East Waterway a size of vessel and a volume of shipping, such volume to materially increase with the opening of the Duwamish Waterway, which were entirely unforeseen when said pier head lines were so indicated.

Therefor- the Port Commission now and hereby finds the fact to be that an open fairway of 750 feet in width in the East Waterway is essential in the interest of navigation.

Section 2. The Port of Seattle is now developing at the south end and on both sides of said waterway an ocean terminal at a cost
100 exceeding four million dollars, which is so planned and is so to be constructed that the largest ships and cargoes which may come into or go out of the harbor of Seattle may be accommodated thereat, and by modern methods to be adopted for their accommodation and cheapness of the port to shipping, to be consummated by their public operation, the shipping of the port and the commerce of the state will be advantaged and increased thereby; and to the successful operation of said terminal a fairway in and throughout the length of the East Waterway, not less than 750 feet in width, is essential, and the Port Commission now and hereby so finds the fact to be;

Now, therefore, be it resolved by the Port Commission of the Port of Seattle, as follows:

Section 1. Insomuch as the Legislature, by Chapter 168 of the session laws of 1913, empowered the Port of Seattle to make use of any portion of the waterway area in the East Waterway situate between the shore on either side and the pier head line without having to acquire the right so to do from any shore owner by condemnation or otherwise, the Port Commission of the Port of Seattle does hereby

find and declare that the outer one-half of the waterway area between the shore and the pier head line on either side of said waterway is needed to be used by the Port of Seattle for the purpose of navigation, for the reasons aforesaid, and for other sufficient reasons in the public interest, and the same is hereby appropriated by the Port of Seattle, not only for the purposes of navigation generally, but as a necessary means of access to and egress from its ocean terminals aforesaid, and the same is hereby dedicated to those purposes and accordingly reserved from permit or license under the provisions of said Chapter 168.

101 Adopted by the Port Commission of the Port of Seattle in open session this 10th day of September, 1913, and signed by its proper officers in open session authentication of its passage, on the same date.

H. M. CHITTENDEN,
President of the Port Commission of the Port of Seattle.

Attest:

C. E. REMSBERG,
Secretary of the Port Commission of the Port of Seattle.

Case No. 118 E. Plaintiffs' Exhibit 8. United States District Court, Western Dist. of Washington. Port of Seattle vs. O. W. R. R. Co. et al. Filed Mar. 14, 1918. Frank L. Crosby, Clerk, by S. E. Leitch, Deputy. (Permitted to be filed. Ruling reserved as to competency.)

102 Plaintiffs' Exhibit 10 is as follows:

This indenture: Made this — day of February, 1918, by and between the Port Commission of the Port of Seattle, and the East Waterway Dock & Warehouse Co., a corporation, hereinafter termed the Permittee;

Witnesseth: That, whereas, the Permittee has leased from the Oregon-Washington Railway Company, lots 10 to 16, inclusive, block 394 of Seattle Tide Lands, according to the official plat thereof, and

Whereas, on the — day of January, 1918, said Permittee filed with the Port Commission an application under an Act of the Legislature approved March 22, 1913, entitled "An Act permitting and regulating the use of the waterway areas between the boundaries thereof and Government Pierhead Lines, and providing for the disposition of receipts therefrom, for a permit covering the portion of the West Waterway in the harbor of Seattle, hereinafter described.

Now, therefore, the Port Commission does hereby grant unto the Permittee a permit to use the following described property situated in the Port District of Seattle, and being a part of the East Waterway situated in front of the lands above described, the portion

of the Waterway, the use of which is so granted, being more particularly described as follows, to wit:

Beginning at the intersection of the north line of West Hanford street and the west margin of the East Waterway; thence north 45° east, a distance of 176.77 feet to the pierhead line; thence north along pierhead line 604.44 feet; thence south 45° west 176.77 feet to the west margin of East Waterway; thence south along the west margin of East Waterway 604.44 feet; containing 75,555 square feet.

For the term of twenty-five years (25) from the first day of September 1913, said date being taken as the date of commencement of this Permit. This Permit is granted in consideration of
103 the covenants, conditions and stipulations herein contained, and of the payment of the sum of Eight hundred sixty-five and 60/100 ($865.60) Dollars, being the rental on said waterway area from September 1, 1913 to September 1, 1918, the receipt of which sum is hereby acknowledged and in consideration of the payment annually, beginning the first day of September, 1918, of the sum of two hundred sixteen and 40/100 ($216.40) Dollars, payable annually in advance, said sum being equal to two per cent of the assessed valuation of 1912, of an equal area of adjoining and abutting lands (exclusive of improvements thereon). Each subsequent payment is to be made on or before the first of September, 1918.

The rental above prescribed shall cover only so much of the twenty-five year term as will intervene between —— and ——, the rental after December 31st 1928, to be controlled and fixed in the manner and by the public authority or authorities then provided by law for the same; but in case *on* provision shall then have been made for the manner of fixing or the public authority to fix the same, then such rental shall be fixed by the Port Commission.

The permittee covenants to give and keep in force during the term of this lease the bond required by said Act of the Legislature in the penal sum of Five hundred Dollars ($500).

The Permittee covenants not to make or suffer to be made any artificial filling in any of said area or any deposit of rock, earth, ballast, refuse, garbage, or other material, within such area, except such as may have been previously approved in writing by the Port Commission.

It is a condition of this Permit that the area herein described or such reasonable portion thereof as shall be designated by the Port Commission, having in view the requirements of the business
104 proposed to be carried on thereon, shall be improved upon plans approved by the Port Commission, the construction of such improvement to be commenced on or before the — day of —— and to be completed on or before the — day of —— unless either of such times shall be hereafter extended by resolution of the Port Commission, and the Port Commission hereby approved the plans for said improvement and the sufficiency of the area to be improved which are described in the Exhibits "A" and "B" and "C" accompanying the permittee's application for this permit filed in the office of the Port Commission — and numbered —, so far as the

same are embraced within the area above described, but the other character of said improvements may be changed either before or after completion by the consent in writing of the Port Commission.

It is mutually covenanted as follows:

(1) Nothing herein contained shall confer upon, create or recognize in the Permittee any right or privilege in or to any strip of waterway abutting any street end between prolongations of the lines of such street, but the control of and the right to use such strip is hereby reserved to and recognized to be in the Port of Seattle.

(2) The Port Commission shall have power, upon sixty (60) days' notice, to cancel this permit for a substantial breach by the permittee of any of the conditions thereof, or for lack of a bond as herein required.

(3) The Permittee hereby waives any claim for damage which may occur to its improvements by reason of the dredging to a depth of minus fifty-two (52) feet City datum with the necessary slopes of the fairway established by Resolution No. 143 of the Port
105 Commission.

(4) The permittee hereby waives any and all claim for a permit for any part of the East Waterway in front of his or its said tide lands outside of the area *fo* said waterway hereinbefore described.

(5) Whereas, a certain litigation is pending between the Port of Seattle and the Oregon-Washington Railway and Navigation Co., in which there is involved the right of the Port of Seattle to collect rent on said waterway area in said waterway; it is agreed that in the event a final judgment is entered by the Court of Last Resort, to which said litigation is subject, that the Port of Seattle is not entitled to collect such rent, then the Port of Seattle agrees to reimburse second party for the rental paid hereunder.

Executed in duplicate the day herein first named.

THE PORT COMMISSION OF THE PORT OF SEATTLE,

By —— ——,
Its President.

Attest:

—— ——,
Its Secretary.

EAST WATERWAY DOCK AND WAREHOUSE CO.,

By —— ——,
Its President.

Attest:

—— ——,
Its Secretary.

106 *Bond.*

The undersigned: East Waterway Dock & Warehouse Company, a corporation, as Principal, and —— —— and —— —— as sureties, do confess ourselves indebted to the Port of Seattle in the penal

sum of Five hundred Dollars, and for the payment of which, we so by these presents bind ourselves, and our and each of our, heirs executors, administrators or successors, jointly and severally, firmly by these presents.

Sealed with our seals this — day of February, 1918.

The condition of the above obligation is such that,

Whereas, the Principal did enter into the foregoing contract with the Port Commission of the Port of Seattle (which contract is hereby made a part of this bond), whereby the Principal accepted a permit from the said Port Commission for the use of the area of waterway described in said permit, conditioned for the payment of certain rentals specified therein;

Now, therefore, if the said permittee, the principal herein, shall well and truly pay said rentals, then this bond shall be considered satisfied and discharged; otherwise it shall have full force and effect.

Signed and sealed the day and year in this bond first above written.

EAST WATERWAY DOCK & WAREHOUSE CO.,

By —— ——,
Its President.

Attest:

—— ——,
Its Secretary.

—— ——,

—— ——,
Sureties.

107 STATE OF WASHINGTON,
County of King, ss:

—— —— and —— —— being first duly sworn, each for himself, and not one for the other, deposes and says: That he is one of the sureties to the foregoing bond; that he is a citizen of the State of Washington and is not barred by any statute of said state from executing bonds or becoming surety; that his execution of the foregoing bond is his free and voluntary act and deed for the uses and purposes therein mentioned; that he is worth the sum of $500 over and above all his just debts and liabilities, in property situate in the State of Washington and not exempt from sale on execution.

—— ——.
—— ——.

Subscribed and sworn to before me, this — day of February, 1918.

—— ——
Notary Public in and for the State of Washington, Residing at Seattle.

The foregoing bond and surety thereon approved this — day of February, 1918.

President of the Port Commission of the Port of Seattle.

Case No. 118E. Plaintiff's Exhibit 10. United States District Court, Western Dist. of Washington. Port of Seattle vs. O. W. R. R. Co. et al. Filed Mar. 14, 1918. Frank L. Crossby, Clerk. By S. E. Leitch, Deputy. (Admitted)

108 Plaintiffs' Exhibit 12 is as follows:

No. 41.

Application for Waterway Permit.

To the Port Commission of the Port of Seattle:

The undersigned J. F. Duthie & Company, a Corporation entitled to acquire and hold lands under the laws of the state of Washington, residing at Seattle, Washington, hereby applies for a permit for the use of the following described portion of the waterway situate in the Port of Seattle, to wit: an area 125 feet in depth, in front of lots 6-15 incl., block 393, of Seattle Tide Lands, according to the official plat thereof, the shore frontage being particularly described as follows:

Beginning at the intersection of the southerly margin of West Hanford Street and the west margin of the East Waterway; thence south four hundred seventy and twenty-eight hundredths (470.28) feet to the true point of beginning; thence south along the west margin of the East Waterway seven hundred sixty-three (763) feet; thence east one hundred twenty-five (125) feet to pierhead line; thence north along pierhead line eight hundred eighty-eight (888) feet; thence south forty-five (45) degrees west one hundred seventy-six and seven hundred seventy-seven thousandths (176.777) feet to point of beginning, containing 103,250 square feet; the same being shown on the plat, marked "Exhibit A," attached to and made a part hereof.

Said permit is desired for the term of 3 years, for the purpose of improving the following portion thereof: All as described above in the following manner, to-wit:

109 To build wharf, drive dolphins and mooring piles, launching ways, etc., for ship yard, the said improvement being described in the accompanying exhibits "B" and "C."

The applicant desires to commence the construction of the improvement within 30 days after the granting of the permit.

The applicant estimates the rental to be $288.16 per year.

This application is made in accordance with the terms and provisions of Chapter 168, Session Laws of 1913, and is submitted subject to the approval of said Port Commission as to extent of area to be

improved, character of improvement, and time of commencement and completion of construction of improvement.

Dated at Seattle, Wash., this 4th day of October, A. D. 1916.

J. F. DUTHIE & CO.,

(Signed) By C. D. BOWLES, *Pres.*

Applicant.

P. O. Address—.

NOTE.—See instructions on reverse side.

(Instructions on Reverse Side.)

Rules Governing the Submission of Applications for Waterway Permits.

1. Accompanying each application and made a part thereof shall be: (*a*) a map marked "Exhibit A," showing the location of the portion of the waterway, use of which is desired; (*b*) a plat marked "Exhibit B," showing detail plans of improvements to be made or already existing on the applied for area; (*c*) specifications marked "Exhibit C," to accompany the detail plans in "Exhibit B."

110 2. "Exhibit A" must be on good quality mounted paper, 18x24 inches, and must show the location of the area desired with the frontage of the adjoining lots or blocks of the tide lands; also the ground plan of docks or wharves to be constructed or existing; also showing buildings located on or proposed for such wharves. All courses and distances must be clearly marked. The projection of all upland streets (unless such streets have been vacated by the city) must be excluded. Where the pier head line is a tangent, the area applied for must be bounded by the projection of the abutting lot or block lines. Where angles occur in such abutting lot or block lines, the area in front of such angle will be divided by bisecting such angle. Where angles occur in the pier head line, the area in front of such angles will be divided by the bisection of the angle.

3. "Exhibit B" shall be on a good quality of mounted paper, 18x24 inches, and shall show a detail plan of the improvements to be made or already existing, showing distances from center to center of piles, depth of water, height above water, and details of superstructures; also showing methods of bracing, where any is used; also a plan of slips; but no buildings need be shown on the detail plans.

4. "Exhibit C" must accompany the application, and must give length and dimensions of piling and depth driven, dimensions of caps, dimensions and spacing of stringers, thickness of planking, length and dimensions of drift bolts, size and number of spikes, and details of construction.

5. "Exhibit B. and C," here called for, are intended to cover all details of the construction of docks, wharves and other struc-

111 tures; and such plans and specifications must be such as would be used in actual construction, and no detail, whether

here called for or not, must be omitted that would be necessary to such construction.

6. If the applicant is a corporation, the application must contain a statement showing what percentage, if any, of its capital stock is held by aliens.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. April 8, 1918. Frank L. Crosby, Clerk. By Edw. Lakin, Deputy.

112 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant and Appellant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. Duthie & Company, a Corporation, Defendants and Appellees.

Order Approving Statement of Evidence and Directing Annexation of Exhibits.

The foregoing statement of evidence having been heretofore lodged in the clerk's office and due notice having been given to the attorneys of all parties of such lodgment, and more than ten days having elapsed after such notice, and this being the time and place named in said notice for the approval of said statement, and no objection having been made or amendments proposed by any party, it is by the court

Found that said statement is true, properly prepared and complete, with the exception of the exhibits hereinafter mentioned, and the said statement is now approved and made a part of the record herein for the purpose of appeal.

It is further ordered that the clerk of this court be and he is hereby directed to annex to the said statement Exhibits Nos. 1, 3, 4, 5, 6, 7, 9 and 11, on file in this court, and the said exhibits are hereby made a part of the said statement of evidence and a part of the record herein for the purposes of appeal.

Done in open court this fifteenth day of April, 1919.

EDWARD E. CUSHMAN,
Judge.

Indorsed: Statement of Evidence. Filed in the United States District Court, Western District of Washington, Northern Division, Apr. 15, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

113 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, et al., Defendants.

Petition for Appeal.

To the Honorable Jeremiah Neterer, District Judge:

The above named Port of Seattle, complainant in the above entitled cause, feeling aggrieved by the decree rendered and entered in the said cause on the 14th day of February, A. D. 1919, does hereby appeal from the said decree to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith, and prays that its appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, under the rules of said court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it be made.

HAROLD PRESTON AND
PRESTON, THORGRIMSON & TURNER,
Attorneys for Complainant and Appellant.

Appeal allowed this 15th day of April, 1919, upon giving bond as required by law for the sum of Five hundred Dollars ($500.00).

EDWARD E. CUSHMAN,
Judge.

114 Indorsed: Petition for Appeal. Filed in the United States District Court, Western District of Washington, Northern Division, April 15, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

115 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant and Appellant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, et al., Defendants and Appellees.

Assignment of Errors.

Now comes the complainant and appellant in the above entitled cause and files the following assignment of errors upon which complainant and appellant will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the Fourteenth day of February, 1919.

I.

That the District Court of the United States for the Western District of Washington, Northern Division, erred in denying complainant's motion to remand the above entitled cause to the Superior Court of the State of Washington in and for King County.

II.

That said District Court erred in failing and refusing to enter a decree for complainant as prayed for in complainant's complaint in the above entitled cause.

III.

That said District Court erred in entering a decree in said cause finding and decreeing that complainant has no proprietary rights or interests in the water area between the shore line and the pierhead line in front of the lots owned by the defendant Oregon & Washington Railroad Company, described in the pleadings in said cause.

116 IV.

That said District Court erred in finding and decreeing that complainant is not entitled to lease the waterway area between the shore line and the pier head line in front of the lots owned by the defendant Oregon & Washington Railroad Company, described in the pleadings herein.

V.

That said District Court erred in finding and decreeing that complainant is not entitled to deprive the defendant Oregon & Washington Railroad Company of access to the navigable waters of said waterway over said waterway area.

VI.

That said District Court erred in finding and decreeing that the provisions of Chapter 169 of the Laws of Washington of 1913, providing for leasing of said waterway area and collection of revenue therefor, are invalid, because the same are in conflict with Section 10, Article I of the Constitution of the United States and with the Fourteenth Amendment to said Constitution.

VII.

That said District Court erred in finding and decreeing that the defendant Oregon & Washington Railroad Company as the owner of the abutting lots is entitled to access to and from said lots to and from the deep or navigable waters of said waterway across said waterway area subject to proper Governmental supervision.

VIII.

That said District Court erred in finding and adjudging in the said decree that the State of Washington has never established any harbor lines in said waterway.

117

IX.

That said District Court erred in finding and adjudging in the said decree that complainant is not entitled to any equitable relief in the above entitled cause.

X.

That said District Court erred in decreeing that the bill of complaint in the above entitled cause be dismissed.

Wherefore the complainant and appellant prays that said decree be reversed, and that said District Court for the Western District of Washington, Northern Division, be ordered to enter a decree reversing the said decree of the above entitled District Court and awarding complainant and appellant the relief prayed for in the bill of complaint herein.

HAROLD PRESTON AND
PRESTON, THORGRIMSON &
TURNER,
Attorneys for Complainant and Appellant.

Indorsed: Assignment of Errors. Filed in the United States District Court, Western District of Washington, Northern Division, April 15, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

118 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant and Appellant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. Duthie & Company, a Corporation, Defendants and Appellees.

Bond on Appeal.

Know all men by these presents, That we, Port of Seattle, a municipal corporation, as principal, and Fidelity and Deposit Company of Maryland, a surety company duly authorized to do business under the laws of the State of Washington, as surety, are held and firmly bound unto Oregon & Washington Railroad Company, a corporation, and J. F. Duthie & Company, a corporation, defendants above named, in the sum of Five Hundred Dollars ($500.00), lawful money of the United States, to be paid to them and their respective successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors, by these presents.

Sealed with our seals and dated this 15th day of April, 1919.

Whereas, the above named Port of Seattle, a municipal corporation, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree of the United States District Court for the Western District of Washington, Northern Division, in the above entitled cause,

Now, therefore, the condition of this obligation is such that
119 if the above named Port of Seattle shall prosecute its said appeal to effect and answer all costs if it fails to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

PORT OF SEATTLE, A MUNICIPAL CORPORATION,
By ROBERT BRIDGES,
President of the Port Commission of the Port of Seattle, and
T. S. LIPPY,
Secretary of the Port Commission of the Port of Seattle.
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
L. J. WYCKOFF,
Attorney-in-Fact,
A. W. WHALLEY,
Agent.

[Corporate Seal of F. & D. Co.]

The within bond is approved both as to sufficiency and form this 15th day of April, 1919.

EDWARD E. CUSHMAN,
Judge of the District Court of the United States for the Western District of Washington, Northern Division.

Indorsed: Bond on Appeal. Filed in the United States District Court, Western District of Washington, Northern Division, April 15, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

120 United States District Court, Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant and Appellant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. Duthie & Company, a Corporation, Defendants and Appellees.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of record for appeal in the above entitled cause, and will include in the said transcript the following:

1. The record on removal from the Superior Court of the State of Washington in and for King County to the above entitled court, consisting of the following papers.

(a) Complaint.

(b) Affidavit of Service.

(c) Summons.

(d) Petition of Oregon & Washington Railroad Company for removal.

(e) Order granting petition for removal.

(f) Notice of presenting petition and bond for removal.

(g) Bond on removal.

(h) Certificate of Superior Court Clerk as to transcript.

2. Motion to Strike, filed February 5th, 1917.

3. Motion to Remand, filed April 20th, 1917.

4. Memorandum Decision, filed May 7th, 1917.

5. Order Denying Motion to Remand, filed May 9th, 1917.

6. Order Granting Motion to Strike, filed May 22nd, 1917.

7. Answer of Defendant Oregon & Washington Railroad Company, filed June 18th, 1917.

8. Election to stand on Complaint, filed June 20th, 1917.

9. Answer of Defendant J. F. Duthie & Company, filed October 20th, 1917.

121 10. Memorandum Decision, filed September 9th, 1918.

11. Decree, filed February 14th, 1919.

12. Order Entering Exceptions, filed February 14th, 1919.

13. Statement of Evidence with attached exhibits, and order approving same.

14. Petition for appeal and allowance thereof.

15. Assignment of Errors.

16. Bond on Appeal and approval thereof.

17. Stipulation filed April 15, 1919.

To which transcript should be annexed the original citation on appeal.

Respectfully submitted,

HAROLD PRESTON,
PRESTON, THORGRIMSON & TURNER,
Attorneys for Complainant and Appellant.

Acknowledgment of Service.

We hereby acknowledge service of the foregoing Praecipe this 15th day of April, 1919.

____ ____,
Attorneys for Defendant and Appellee Oregon & Washington Railroad Company.

____ ____,
Attorneys for Defendant and Appellee J. F. Duthie & Company.

Service of the within Praecipe by delivery of a copy to the undersigned is hereby acknowledged this 15th day of April, 1919.

BOGLE, MERRITT & BOGLE,
Attorneys for Def't & Appellee Oregon & Washington Railroad Company.

AUST & TERHUNE,
Attorneys for Def't and Appellee J. F. Duthie & Co.

Indorsed: Præcipe for Transcript of Record. Filed in the United States District Court, Western District of Washington, Northern Division, April 15, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

122 United States District Court, Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. Duthie & Company, a Corporation, Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 121, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by præcipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the Supreme Court of the United States.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred, and paid in my office by or on behalf of the Appellant for making record, certificate or return to the Supreme Court of the United States, in the above entitled cause, to wit:

123 Clerk's fee (Sec. 828 R. S. U. S.), for making record, certificate or return, 327 folios at 15c..... $49.05
Certificate of clerk to transcript of record—4 folios at 15c. .60
Seal to said certificate..... .20
Certificate of clerk to copies of original exhibits—3 folios at 15c ..... .45
Seal to said certificate..... .20

I hereby certify that the above cost for preparing and certifying record amounting to $50.50 has been paid to me by counselors for appellant.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

In witness whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 2d day of May, 1919.

[Seal United States District Court, Western District of Washington.]

F. M. HARSHBERGER,
Clerk United States District Court.

124 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainants and Appellant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. Duthie & Company, a Corporation, Defendants and Appellees.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Oregon & Washington Railroad Company, a corporation, and J. F. Duthrie & Company, a corporation, Greeting:

You are cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington, in the District of Columbia, in not exceeding sixty days from the date of signing this citation, pursuant to an order allowing an appeal, filed and entered in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, from the final decree signed, filed and entered on the fourteenth day of February, 1919, in that certain suit, being In Equity No. 118, wherein Port of Seattle, a municipal corporation, is complainant, and you are defendants and appellees, to show cause, if any there be, why the decree against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness, the Honorable Edward E. Cushman, United States
125 District Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 5th day of April, A. D. 1919, and of the Independence of the United States, 143.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington, Northern Division.

126 & 127 Service of the within citation by delivery of a copy to the undersigned is hereby acknowledged this 15th day of April, 1919.

BOGLE, MERRITT & BOGLE,
Attorneys for Def't and Appellee,
Oregon & Washington Railroad Company.
AUST & TERHUNE,
Attorneys for Def't and Appellee,
J. F. Duthie & Co.

Office of the Clerk Supreme Court U. S. Received May 9, 1919.

[Endorsed:] In Equity. No. 118. In the District Court of the United States for the Western District of Washington, Northern Division. Port of Seattle, a municipal corporation, Complainant, vs. Oregon & Washington Railroad Company, et al., Defendants. Citation. Filed in the United States District Court Western District of Washington, Northern Division, Apr. 15, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy. Service of papers in this case may be made upon Preston, Thorgrimson & Turner, Attorneys for Complainant, at Room 911 Lowman Block, Seattle, Washington.

Endorsed on cover: File No. 27,128. W. Washington D. C. U. S. Term No. 1042. Port of Seattle, appellant, vs. Oregon & Washington Railroad Company and J. F. Duthie & Company. Filed May 22d, 1919. File No. 27,128.